THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Mx. North Gallery

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-family-division_1946

1946

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

PROBATE, DIVORCE,

AND ADMIRALTY DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL:

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR - - - - RALPH SUTTON, K.C.

ASSISTANT EDITOR - - H. MONTGOMERY HYDE.

REPORTERS:

Court of Appeal -	H. C. GARSIA, J. W. HALL,	*Barristers-at-Law.*
Probate and Divorce -	Miss V. J. M. STEPHENSON, Mrs. I. G. R. MOSES,	*Barristers-at-Law.*
Admiralty Cases -	E. C. M. TREHERN, H. GREENFIELD,	*Barristers-at-Law.*
Ecclesiastical Cases	W. L. L. BELL,	*Barrister-at-Law.*

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 6 STONE BUILDINGS, LINCOLN'S INN, LONDON, W.C.2,

AND

PRINTED BY GEO. BARBER & SON LTD., 23 FURNIVAL STREET, LONDON, E.C.4.

P. 1946. *b* 5

BIBL. LONDIN UNIV.

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

MEMBERS OF THE COUNCIL.

Chairman—Sir HERBERT CUNLIFFE, K.B.E., K.C.

Vice-Chairman—Sir STANLEY POTT.

EX-OFFICIO MEMBERS.

Right Hon. Sir HARTLEY SHAWCROSS, K.C., M.P.	ATTORNEY-GENERAL.
Sir FRANK SOSKICE, K.C., M.P.	SOLICITOR-GENERAL.
DOUGLAS T. GARRETT, Esq.	President of the Law Society.

ELECTED MEMBERS.

Sir HERBERT CUNLIFFE, K.B.E., K.C. J. H. STAMP, Esq.	Lincoln's Inn.
Right Hon. Lord Justice LAWRENCE, D.S.O. J. V. NESBITT, Esq.	Inner Temple.
Sir JOSHUA SCHOLEFIELD, K.C. W. PRICE, Esq.	Middle Temple.
Sir WILLIAM L. MCNAIR, K.C. HENRY EDWIN SALT, Esq., K.C.	Gray's Inn.
H. O. DANCKWERTS, Esq. G. F. KINGHAM, Esq.	Appointed by the Council on the nomination of the General Council of the Bar.
Sir STANLEY POTT (Firm : Messrs. Holmes, Son & Pott) G. D. COLCLOUGH, Esq. (Firm : Messrs. Johnson, Jecks & Colclough)	The Law Society.

Secretary—J. H. BOWMAN, Esq.

6 Stone Buildings, Lincoln's Inn, W.C.2.

JUDGES

OF

THE COURT OF APPEAL

1946.

Lord JOWITT, Lord Chancellor.
Lord GODDARD, Lord Chief Justice of England.
Lord GREENE, Master of the Rolls.

Lord MERRIMAN	President of the Probate, Divorce, and Admiralty Division.

Sir LESLIE FREDERIC SCOTT	Lords Justices.
Sir FRANK DOUGLAS MACKINNON (died January 23, 1946)	
Sir GEOFFREY LAWRENCE	
Sir FERGUS DUNLOP MORTON	
Sir FREDERICK JAMES TUCKER	
Sir ALFRED TOWNSEND BUCKNILL	
Sir DONALD BRADLEY SOMERVELL	
Sir LIONEL LEONARD COHEN	
Sir CYRIL ASQUITH	

JUDGES

OF THE

PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE

1946.

Lord MERRIMAN, President.

Sir FRANCIS LORD CHARLTON HODSON.

Sir GONNE ST. CLAIR PILCHER.

Sir HUBERT JOSEPH WALLINGTON.

Sir HENRY WILLIAM BARNARD.

Sir AUSTIN ELLIS LLOYD JONES.

Sir LAURENCE AUSTIN BYRNE.

Sir HENRY GORDON WILLMER.

ATTORNEY-GENERAL.

Sir HARTLEY WILLIAM SHAWCROSS.

SOLICITOR-GENERAL.

Sir FRANK SOSKICE.

BIBL
LONDIN
UNIV

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1946, is as follows :—

In the First Series,
[1946] Ch.

In the Second Series,
[1946] K. B. [1946] P.

In the Third Series,
[1946] A. C.

TABLE OF CASES REPORTED
IN THIS VOLUME.

A.

	PAGE
Alston *v.* Alston	203
Athelvictor, The	42

B.

Baindail (orse. Lawson) *v.* Baindail	122
Beard *v.* Beard	8

C.

Cowen *v.* Cowen	36

E.

Emanuel *v.* Emanuel	115

F.

Fenston *v.* Fenston	70

G.

G., Decd., In the Estate of	183
Gordon *v.* Gordon	99
Green *v.* Green	112

H.

Henry Hornby, Decd., In the Goods of	171
Humorist, The	198

J.

Johnson *v.* Johnson	205

L.

	PAGE
L., M. *v.*	183

M.

M. *v.* L.	183
M. *v.* M.	31
Meacher *v.* Meacher	216

N.

Nicholson (J. W.) & Co., Ld. *v.* Owners of the Barge Humorist	198

P.

Perks *v.* Perks	1
Princesa, The	79

S.

Spawforth *v.* Spawforth	131
Srini Vasan (orse. Clayton) *v.* Srini Vasan	67

T.

Tolten, The	135
Tweney *v.* Tweney	180

U.

Underwood *v.* Underwood	48

W.

Wolfe, The F. J.	91
Wolfenden *v.* Wolfenden	61

CASES FOLLOWED, OVERRULED, DISTINGUISHED AND JUDICIALLY CONSIDERED.

Ainley v. *Ainley* - - - [1945] P. 27
Overruled. BEARD *v.* BEARD
C. A. 8

Bednall v. *Bednall* - - [1927] P. 225
Not followed. M. *v.* M.
Denning J. 31

British South Africa Co. v. *Companhia de Moçambique* [1893] A. C. 602.
Discussed and distinguished. THE TOLTEN - - **C. A. 135**

Catterall v. *Catterall* (1847) 1 Rob. Eccl. 586
Followed. WOLFENDEN *v.* WOLFENDEN - **Lord Merriman P. 61**

Chapman v. *Chapman and Thomas* [1938] P. 93.
Followed. SPAWFORTH *v.* SPAWFORTH - - **Hodson J. 131**

Churchman v. *Churchman* - [1944] P. 44
Followed. EMANUEL *v.* EMANUEL
Denning J. 115

Green v. *Green* - - - [1929] P. 101
Not followed. M. *v.* M.
Denning J. 31

Higgins v. *Higgins* - - [1943] P. 58
Approved. BEARD *v.* BEARD
C. A. 8

Howard-Williams v. *Howard-Williams* [1944] P. 85.
Dissented from. SPAWFORTH *v.* SPAWFORTH - **Hodson J. 131**

Hyde v. *Hyde* - - (1888) 13 P. D. 166
Dictum of Cotton L.J. at p. 171 disapproved. GORDON *v.* GORDON
C. A. 99

Jones v. *Jones* - [1929] 45 T. L. R. 292
Not followed. M. *v.* M.
Denning J. 31

Langworthy v. *Langworthy* (1886) 11 P. D. 85
Approved. M. *v.* M.
Denning J. 31

Mackenzie v. *Mackenzie* - [1940] P. 81
Referred to. GREEN *v.* GREEN
Jones J. 112

Maclean v. *Cristall* (1849) 7 N. C. supp. pp. xvii, xxiv.
Followed. WOLFENDEN *v.* WOLFENDEN - **Lord Merriman P. 61**

Reg. v. *Mills* - (1844) 10 Cl. & F. 534
Distinguished. WOLFENDEN *v.* WOLFENDEN **Lord Merriman P. 61**

Spurgeon v. *Spurgeon* (1930) 26 T. L. R. 396
Followed. TWENEY *v.* TWENEY
Pilcher J. 180

Srini Vasan (*orse. Clayton*) v. *Srini Vasan* [1946] P. 67
Followed. BAINDAIL (ORSE. LAWSON) *v.* BAINDAIL **C. A. 122**

Taylor v. *Taylor* - - [1938] 1 K. B. 320
Discussed and applied. JOHNSON *v.* JOHNSON - - **Divl. Ct. 205**

Timmins v. *Timmins* - - [1919] P. 75
Observations of Hill J. at p. 80 approved. UNDERWOOD *v.* UNDERWOOD - - - **Divl. Ct. 84**

Tuck, In re - - - [1906] 1 Ch. 692
Followed. GORDON *v.* GORDON
C. A. 99

RULES JUDICIALLY CONSIDERED.

Matrimonial Causes, 1944 (*St. R. & O.*, 1944, *No.* 389/L. 16), *r.* 33, *sub-r.* 1.
FENSTON *v.* FENSTON **C. A. 70**

——— *r.* 62, *sub-r.* 2. GORDON *v.* GORDON
C. A. 99

STATUTES JUDICIALLY CONSIDERED.

1837.

Wills (7 *Will.* 4 & 1 *Vict.*, *c.* 26), *s.* 9. IN THE GOODS OF HENRY HORNBY, DECEASED - **Wallington J. 171**

1852.

Wills Act Amendment (15 & 16 *Vict.*, *c.* 24), *s.* 1. IN THE GOODS OF HENRY HORNBY, DECEASED **Wallington J. 171**

1861.

Admiralty Court (24 *Vict.*, *c.* 10), *s.* 7. THE TOLTEN - - **C. A. 135**

1894.

Merchant Shipping (57 & 58 *Vict.*, *c.* 60), *s.* 503. THE ATHELVICTOR **Pilcher J. 42**

1895.

Summary Jurisdiction (Married Women) (58 & 59 *Vict.*, *c.* 39), *s.* 7. UNDERWOOD *v.* UNDERWOOD **Divl. Ct. 84**

——— *s.* 10. PERKS *v.* PERKS **C. A. 1**

1900.

Merchant Shipping (Liability of Shipowners and Others) (63 & 64 *Vict.*, *c.* 32), *s.* 1. THE ATHELVICTOR **Pilcher J. 42**

——— *s.* 2, *sub-ss.* 4, 5. J. & W. NICHOLSON & CO., LD. *v.* OWNERS OF THE BARGE HUMORIST **Willmer J. 198**

1914.

Criminal Justice Administration (4 & 5 *Geo.* 5, *c.* 58), *s.* 30, *sub-s.* 3. UNDERWOOD *v.* UNDERWOOD **Divl. Ct. 84**

1925.

Supreme Court of Judicature (Consolidation) (5 & 6 *Geo.* 5, *c.* 49), *s.* 176. MEACHER *v.* MEACHER **C. A. 216**

——— (15 & 16 *Geo.* 5, *c.* 4), *s.* 193. M. *v.* M. **Denning J. 31**

1926.

Legitimacy (16 & 17 *Geo.* 5, *c.* 60), *s.* 1. M. *v.* M. - - **Denning J. 31**

1935.

Money Payments (Justices Procedure) (25 & 26 *Geo.* 5, *c.* 46), *s.* 9. UNDERWOOD *v.* UNDERWOOD - **Divl. Ct. 84**

1937.

Matrimonial Causes (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2. ALSTON *v.* ALSTON **Willmer J. 203**

——— *s.* 2. MEACHER *v.* MEACHER **C. A. 216**

——— *s.* 6, *sub-s.* 3. GREEN *v.* GREEN **Jones J. 112**

——— *s.* 7, *sub-s.* 1 (*a*). COWEN *v.* COWEN - - - **C. A. 36**

ERRATA

[1945] P., at title pages. Between the names of Sir Donald Somervell, K.C., M.P., and Sir Hartley Shawcross, K.C., M.P., Attorneys-General read "Sir David Maxwell Fyfe, K.C., M.P. (appointed May 29th, 1945)."

Between the names of Sir David Maxwell Fyfe, K.C., M.P., and Sir Frank Soskice, K.C., M.P, Solicitors-General read "Sir Walter Monckton, K.C., K.C.V.O. " (appointed May 29th, 1945)."

1945] P., at p. 31. Counsel appearing for the wife was *W. Hugh Evans* (*D. Henderson* with him).

[1946] *P.* at pp. 205–215, shoulder notes, delete "C.A."

CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

PERKS *v.* PERKS.

C. A.

1945

Oct. 12.

Lord Greene M.R. du Parcq and Morton L.JJ.

Justices—Husband and wife—Order of court of summary jurisdiction for custody of child and for maintenance—Application by husband for discharge of maintenance order only—Refusal on ground that matter "would be more conveniently dealt with in the High Court"—Procedure—Jurisdiction of High Court—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict.*, *c.* 39), *s.* 10.

Section 10 of the Summary Jurisdiction (Married Women) Act, 1895, applies only to cases where there is concurrent jurisdiction in the High Court and in courts of summary jurisdiction. It confers no new jurisdiction on the High Court, and a court of summary jurisdiction cannot under that section refuse to hear and determine, on the ground that it "would be more conveniently dealt with in "the High Court," a matter (such as an application for maintenance unaccompanied by any matrimonial relief) which the High Court has otherwise no jurisdiction to hear.

APPEAL from Denning J. (1).

On September 24, 1943, Mrs. Beryl Perks obtained from a court of summary jurisdiction at Wolverhampton an order

(1) [1945] W. N. 176.

C. A.
1945
PERKS
v.
PERKS.

under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, that she be no longer bound to cohabit with her husband, Stanley John Perks, on the ground of his persistent cruelty, an order conferring on her the legal custody of their infant son, and an order for payment of the weekly sum of thirty shillings for her own maintenance, and ten shillings for the maintenance of the infant until he should attain the age of sixteen. On appeal the Divisional Court, by consent, struck out the separation order. They reduced the order for maintenance of the wife to twenty shillings and left the order for custody unaltered.

On April 5, 1944, the husband applied to the court of summary jurisdiction to discharge the order for maintenance, on the ground that since the making thereof he had made a bona fide offer to provide a home for his wife, and to resume cohabitation, which offer she had unreasonably refused. The stipendiary magistrate refused to deal with the application, because he took the view that it " would be more conveniently " dealt with in the High Court," pursuant to s. 10 of the Summary Jurisdiction (Married Women) Act, 1895 (1).

On February 28, 1945, the husband issued in the Divorce Division a document in the form of an ex parte summons, purporting to be in a cause entitled " Stanley John Perks *v.* " Beryl Perks," asking for directions how to proceed under s. 10 of the Summary Jurisdiction (Married Women) Act, 1895. On that summons Denning J. made an order that a certificate signed by the stipendiary magistrate was to be lodged in the Divorce Registry: that an originating summons in a form scheduled to the order was to be issued out of the Divorce Registry, and that the hearing was to be in open court, with oral evidence. The summons was issued, and on the hearing of it Denning J. discharged the order for maintenance. The wife appealed.

(1) Summary Jurisdiction (Married Women) Act, 1895, s. 10: " If, in the opinion of a court " of summary jurisdiction, the " matters in question, or any of " them, would be more con- " veniently dealt with by the High " Court, the court of summary " jurisdiction may refuse to make " an order under this Act, and in " such case no appeal shall lie from " the decision of the court of " summary jurisdiction: Provided " always, that the High Court or a " judge thereof shall have power by " order in any proceeding in the " High Court relating to or com- " prising the same subject matter " as the application so refused as " aforesaid, or any part thereof, " to direct the court of summary " jurisdiction to rehear and deter- " mine the same."

Glyn-Jones K.C. and *Fairweather* for the wife. Denning J. had no jurisdiction. It is well settled that the High Court can only order maintenance as ancillary to some form of matrimonial relief, and that it cannot make a pure maintenance order. Section 10 of the Act of 1895 does not confer a new jurisdiction on the High Court, but is applicable where there is concurrent jurisdiction in the High Court and the court of summary jurisdiction. It is clear that the husband's advisers treated the magistrate's refusal as a reference to the High Court—a mistake which may have been due to the fact that in two well-known text-books, Lieck and Morrison's Matrimonial Jurisdiction of Justices (Index), and Lushington's Summary Jurisdiction, 3rd ed., p. 207-209, s. 10 is dealt with under the heading " Reference to High Court." It is not a reference, and there is no machinery for bringing it before the High Court, except by the issue of a petition for some matrimonial relief within the High Court jurisdiction.

Loudoun (*Hollins* with him) for the husband. Denning J. was right. Section 10 of the Act of 1895 gives the magistrate power to refuse jurisdiction on the ground that " the matters " in question between the parties or any of them would be more " conveniently dealt with in the High Court." From such a refusal there is no appeal, and if the High Court has no jurisdiction, the applicant would be left without remedy. There is a safeguard against improper use of the power of refusal in the proviso which enables the High Court to order the court of summary jurisdiction to rehear the matter. In the absence of any established procedure, Denning J. was entitled to give such directions as he thought most convenient for bringing the matter before the court.

LORD GREENE M.R. This appeal raises a rather curious question as to the jurisdiction of the High Court under s. 10 of the Summary Jurisdiction (Married Women) Act, 1895. It is necessary to look at one or two sections of that Act in order to understand how it came about that the stipendiary magistrate took the action that he did. Under s. 4 of the Act, a married woman, in certain circumstances there stated, may apply for an order or orders to a court of summary jurisdiction. The orders which the court is empowered to make are a non-cohabitation order, which has the effect of a decree of judicial separation on the ground of cruelty, an order relating to the custody of children, an order for maintenance of the wife up to

C. A.

1945

PERKS v. PERKS.

Lord Greene M.R.

a sum not exceeding 2*l.*, and an order for costs. The circumstances in which a wife can obtain such an order are set out in s. 4, and include persistent cruelty or wilful neglect to provide reasonable maintenance. Under s. 7 of the Act a court of summary jurisdiction, on the application of either party, is empowered to alter, vary or discharge its previous order. It was under that section that the husband in this case invited the court of summary jurisdiction to discharge the maintenance order which had been made in September, 1943, as varied by the order of the Divisional Court. The stipendiary magistrate had to consider s. 10, and he took the view that the husband's application could more conveniently be dealt with by the High Court. The question here is whether he was entitled to take that view, having regard to the nature of the relief that was being asked.

That is the real point at issue on this appeal, but before I deal with it, I will deal with the procedure followed in the case. The husband, in order to bring himself before the High Court, issued, on February 28, 1945, a document in the form of an ex parte summons, purporting to be in a cause entitled "Stanley John Perks *v.* Beryl Perks." But there was no such cause, and, therefore, there was no foundation on which an ex parte summons of this kind could possibly be set. In my view, the procedure was wrong from beginning to end. The relief asked for was this. The parties were summoned to show cause why directions should not be given how to proceed under s. 10. That really was inviting the judge to express an opinion as to what the proper procedure of the applicant should be. On the summons an order was made by Denning J., which, with all respect to that learned judge, I cannot see that he had any jurisdiction at all to make. But an order was actually drawn up and dated March 12, 1945, and duly sealed with the seal of the court. It purports to give the following directions: (1.) that a certificate signed by the stipendiary magistrate was to be lodged in the Divorce Registry; (2.) that an originating summons in the form in the schedule to the order was to be issued out of the Divorce Registry; (3.) the respondent was not to be required to enter an appearance, and the hearing was to be with witnesses giving evidence orally in open court. As I have said, with all respect to the learned judge, he had no jurisdiction to make any such order; but, relying on it, the husband, having obtained a certificate from the stipendiary magistrate, issued what is called an originating summons

in order to get before the court his application for discharge of the maintenance order. This summons recites the maintenance order, the husband's application to have it discharged, the refusal of the stipendiary magistrate to deal with it, and the direction given by Denning J. It then proceeds to require the attendance of the wife to answer the application, and to show cause why the order for the payment of 30s. a week should not be discharged. I cannot find any ground, even if the court had had jurisdiction (which is the point here) to hear the application, for making the application by originating summons. An originating summons is the creature of rules. It is only where the rules of the relevant Division provide that proceedings may be initiated by originating summons that an originating summons can be issued. There is no such provision in relation to the alleged jurisdiction in this case. However, as I have formed the view that there was no jurisdiction to entertain the application at all, the question what would have been the right form of getting the matter before the court does not arise.

The substantial question is, has the High Court, by virtue of the action of the stipendiary magistrate, power to entertain an application for the discharge of an existing order for maintenance? The existing order, so far as is relevant for the purposes of this application, is an order for maintenance and nothing else. There is not on foot any order relating to matrimonial relief in the shape of judicial separation, and the question of the custody of the infant is not raised. The husband is therefore inviting the High Court to deal with a pure question of maintenance, and nothing else. He says that the stipendiary magistrate under s. 10 of the Act had power to decline to make an order in respect of maintenance, on the ground that he thought it would be more convenient if dealt with by the High Court. If the husband's argument is right, it means that s. 10 has conferred on the High Court a jurisdiction, which is to be found nowhere else, in respect of a pure question of maintenance not associated with any matrimonial relief at all. The position (which I understand counsel on both sides agree is correct) would appear to be this with regard to maintenance. Maintenance orders can, of course, be made by the High Court, but only as ancillary to some substantive relief. Pure maintenance, that is to say maintenance granted merely because the husband is not maintaining his wife, is a matter for courts of summary juris-

C. A. 1945

PERKS v. PERKS.

Lord Greene M.R.

diction, and the only jurisdiction of the High Court in such a case is on appeal under s. 11 from a court of summary jurisdiction.

It is said that, quite apart from an appeal, s. 10 has the effect of giving to the High Court an original jurisdiction in the matter of maintenance. It would be curious if that were really the case. When I come to look at the language of s. 10 in its context, however, it appears to me quite clear that it is not the case. The matter on which the court of summary jurisdiction is to form an opinion under s. 10 is whether or not the matters in question between the parties could be more conveniently dealt with by the High Court. Those words " more conveniently dealt with " alone clearly suggest, to my mind, that the legislature was considering a case of concurrent jurisdiction and the question which was the more convenient forum. With regard to the more important matters there is concurrent jurisdiction ; i.e., separation orders and custody of children. Quite clearly, if the wife is asking for relief under either of those heads, that is a matter in respect of which the High Court has jurisdiction. This statutory jurisdiction conferred on the magistrates is a collateral jurisdiction, and, therefore, the question becomes one of which is the more convenient forum. The whole language of the section appears to me, as I have said, to be contemplating a case of alternative fora, and the words " matters in question " mean the matters in question in so far as those matters could, independently of this section, be brought before the High Court. A pure question of maintenance by itself never could be brought before the High Court by original application. The result, in my opinion, is that it is not correct to say that s. 10 by this obscure language, and in some curiously indirect way, has succeeded in vesting the High Court with a jurisdiction which it never possessed otherwise. It seems to me that to do so very much clearer language would be necessary, because the result would be this. Whenever the court of summary jurisdiction thought that a pure question of maintenance could be more conveniently dealt with by the High Court, it could take steps to see that the High Court would have to deal with it. Anything more inconvenient I cannot imagine because questions of maintenance which are brought before stipendiary magistrates are, in general, entirely unsuitable for determination by the High Court. When the question of maintenance is ancillary to some matrimonial relief, the position is entirely different, but pure maintenance is

essentially a matter for a court of summary jurisdiction. That is what I should have thought would have been the approach of the legislature, and that, it seems to me, is the effect of the language which is used.

In the result, the order of Denning J. on the originating summons cannot stand. That order discharged the order of September 24, as varied by the Divisional Court—and the applicant husband had to pay to the respondent wife her taxed costs, leave to appeal being given. In my opinion, the learned judge had no jurisdiction to discharge the order, and the matter ought to have been dealt with by the stipendiary magistrate. The stipendiary magistrate had no power to issue his so-called certificate refusing to entertain the application. He ought to have entertained it and decided it. If either party had been aggrieved by his decision, there was a right of appeal under s. 11. That is the proper procedure.

DU PARCQ L.J. I agree. Section 10 of the Summary Jurisdiction (Married Women) Act, 1895, refers to matters which can be dealt with, and more conveniently dealt with, in the High Court. In my opinion it confers no new jurisdiction on the High Court. If there is no existing jurisdiction in the High Court to deal with the matters in question, then it is wrong to say that those matters may more conveniently be dealt with by the High Court. It is to be observed that the High Court, when dealing with proceedings within its jurisdiction, may find that it has to deal with the same subject-matter which the magistrates have refused to deal with, on the ground that it would be more conveniently dealt with in the High Court, and it may not share that view. There is a proviso then that the court of summary jurisdiction may be directed to "rehear and determine the same." But, for the reasons given by my Lord, I agree that the stipendiary magistrate here was in error, and that Denning J. was wrong in considering that he had jurisdiction to entertain this matter.

MORTON L.J. I agree.

Appeal allowed.

Solicitors for the wife: *Amery-Parkes & Co., for Kendrick, Williams & Feibusch, Wolverhampton.*

Solicitors for the husband: *Stafford Clark & Co., for O. L. Bergendorff, Dudley.*

J. W. H.

Applied. KAFTON *v.* KAFTON. [1948] 1 All E.R. 435.

Applied. ELWES *v.* ELWES. [1950] 1 All E.R. 826.

Applied. RICHARDSON *v.* RICHARDSON. [1949] 2 All E.R. 330.

C. A.

1945

July 2, 3, 24.

Scott, Lawrence L.JJ. and Vaisey J.

Referred to. LANE *v.* LANE [1952] P. 34

BEARD *v.* BEARD.

Divorce—Condoned adultery—Revival by subsequent desertion for less than three years.

A husband condoned the adultery of his wife and took her back. At the end of three weeks the wife deserted him, and refused to return. The husband then petitioned for divorce on the ground of the original adultery, contending that it was revived by the wife's desertion, although it had then continued for only about a year :—

Held, (Vaisey J. dissentiente), that the condoned adultery was revived and was a ground on which a divorce could be obtained by the husband.

Nature of condonation considered.

Decision of Hodson J. reversed.

Higgins v. *Higgins* [1943] P. 58, approved. *Ainley* v. *Ainley* [1945] P. 27, overruled.

APPEAL from Hodson J.

The petitioner, Edgar Hill Beard, was married to Eileen Norah Beard in 1929. The husband was made a prisoner of war in 1940, but was repatriated in October, 1943. During his absence the wife had committed adultery, but on hearing this the husband condoned the offence and took her back. At the end of three weeks, in April, 1944, the wife left the husband and refused to live with him any more, and they had not lived together since. The husband petitioned for divorce on the ground of adultery, anticipating a plea of condonation by alleging desertion as from the end of April.

Hodson J. sent the papers to the King's Proctor so that the question of condonation might be argued.

Sir Donald Somervell A.-G. and *Holroyd Pearce* for the King's Proctor accordingly argued the case before Hodson J.

Hodson J. held that the desertion, being for a period less than three years fixed by s. 2 of the Matrimonial Causes Act, 1937, as in itself a ground for divorce, did not revive the wife's adultery, and dismissed the petition.

The husband appealed.

R. T. Barnard for the appellant read the judgment of Hodson J.

Havers K.C. and *Holroyd Pearce* for the King's Proctor.

Before 1857 only the ecclesiastical courts had jurisdiction to try matrimonial causes, and they only granted divorce a mensa et thoro—a judicial separation. Divorce a vinculo, dissolution of the marriage, could only be obtained by an Act of Parliament. By the Matrimonial Causes Act, 1857, this jurisdiction was transferred to what is now the Divorce Division of the High Court, and in *Dent* v. *Dent* (1) it was held that condonation continued to have the same meaning as in the ecclesiastical courts, and it seems clear that in those courts condonation was conditional and not absolute. By s. 2 of the Matrimonial Causes Act, 1937, desertion for three years was made a substantive ground for divorce, so that desertion in the present case was too short in duration to be in itself a ground of divorce. But the petitioner contended that it was sufficient to revive the condoned adultery of the wife, which could now be relied on as a ground for divorce. In the ecclesiastical courts as early as 1730 it was held that the subsequent commission of a matrimonial offence revived a condoned offence; *Worsley* v. *Worsley* (2), where cruelty, not in itself then a ground for divorce a mensa et thoro, revived condoned adultery and cruelty. [*Durant* v. *Durant* (3) was also referred to.] Condonation means forgiveness with a condition attached; *d'Aguilar* v. *d'Aguilar* (4), i.e., "compli- "ance with the matrimonial decencies and duties," *Houghton* v. *Houghton* (5) per Jeune P. In *Ridgway* v. *Ridgway* (6) Hannen P. held that improper conduct not amounting to adultery was sufficient to revive adultery and cruelty. That shows that the real nature of the condition attached to condonation must be considered. In the Scottish case of *Collins* v. *Collins* (7) Lord Blackburn assumed that the law of England recognized revival of a condoned offence, though he did not agree with it. [*Bostock* v. *Bostock* (8) and *Ex parte Aldridge* (9) were referred to.] In *Palmer* v. *Palmer* (10) it was held that an offence, to revive a condoned offence, must be one on which a divorce might be granted, but that cannot be so because in such a case the question of condonation is superfluous. [*Cooke* v. *Cooke* (11) was referred to.] *Winscom* v. *Winscom* (12)

(1) (1865) 4 Sw. & Tr. 105.
(2) (1730) 2 Lee 572.
(3) (1825) 1 Hag. Ecc. 733.
(4) (1794) 1 Hag. Ecc. 773, 781.
(5) [1903] P. 150, 152.
(6) (1881) 29 W. R. 612.
(7) (1884) 9 App. Cas. 205.
(8) (1858) 1 Sw. & Tr. 221, 224.
(9) (1858) 1 Sw. & Tr. 88, 89.
(10) (1860) 2 Sw. & Tr. 61.
(11) (1863) 3 Sw. & Tr. 126, 137.
(12) (1864) 3 Sw. & Tr. 380.

C. A. 1945 BEARD v. BEARD.

is in the appellants' favour, but was obiter. [*Newsome* v. *Newsome* (1), *Blandford* v. *Blandford* (2) and *Moore* v. *Moore* (3) were referred to.] *Higgins* v. *Higgins* (4) is directly in point. There Pilcher J. held that desertion for less than three years revived condoned adultery: Barnard J. in *Ainley* v. *Ainley* (5) and Wallington J. in *Harrison* v. *Harrison* (6) held the contrary. Desertion is a matrimonial offence irrespective of its duration; *Copsey* v. *Copsey* (7), and in this case is sufficient to revive the condoned offence. [*Price* v. *Price* (8); *Moss* v. *Moss* (9); *Jordan* v. *Jordan* (10); and *Harriman* v. *Harriman* (11) were also referred to.]

R. T. Barnard replied.

Cur. adv. vult.

July 24. The following judgments were read.

SCOTT L.J. This appeal raises the important question, on which opposing views have been taken during the last two years in the Divorce Court, whether a matrimonial wrong, insufficient of itself to entitle the injured spouse to a decree of divorce, nevertheless suffices to remove the bar effected by a previous condonation and thus to revive the original right of the injured spouse to a decree by reason of the former wrong. Pilcher J. answered the question in the affirmative in *Higgins* v. *Higgins* (4). Barnard J. in *Ainley* v. *Ainley* (5), and Wallington J. in *Harrison* v. *Harrison* (6), a case decided at Birmingham Assizes on February 3 last, answered it in the negative. Hodson J. in the present case has followed the two latter decisions and held that no desertion short of the statutory three years can revive the right of petition based on the original adultery. The ground of Pilcher J.'s decision was that whilst a condonation bars further resort to the condoned breach of matrimonial duty as a ground for the intervention of the court in favour of the condoning spouse, any fresh breach of matrimonial duty by the forgiven spouse will undo the condonation, and enure to the benefit of the aggrieved spouse, by reviving the original breach and so enabling the court to base a decree on it.

(1) (1871) L. R. 2 P. & D. 306.
(2) (1883) 8 P. D. 19.
(3) [1892] P. 382.
(4) [1943] P. 58.
(5) [1945] P. 27.
(6) (1945) Unreported.
(7) [1905] P. 94.
(8) [1911] P. 201.
(9) [1916] P. 155.
(10) [1939] P. 239.
(11) [1909] P. 123, 132.

I think Pilcher J.'s view is right; but unfortunately the underlying reasons for that legal conclusion have got a little obscured by a tendency in the discussion for the disputants and the court to express the issue between the opposing views in the terms of a too limited phraseology, with the result that the test to be applied has seemed to depend on the meaning of a particular judicial phrase, " matrimonial offence," used in certain reported cases, rather than on the basic reasons of principle which underlie the controversy. It is said by the one side that " matrimonial offence " means only such a breach of matrimonial duty as will entitle and, perhaps, require the Divorce Court to grant a decree to the aggrieved spouse, and that no degree of matrimonial breach of duty, short of what calls for such a decree, can constitute a " matrimonial offence " within the meaning of the decisions. Their argument is based on the contention that the word " offence " correctly construed carries their meaning. The other side reply that the word " offence " has no statutory force, and is merely a word used compendiously in the cases to cover any matrimonial wrongdoing, whether any decree could or could not be based on the particular wrongdoing in fact established. The dispute has thus seemed to turn on a problem of interpreting a judicial phrase. I think the broader viewpoint is the sounder and that it would be fallacious to limit the argument of principle by any such verbal and restrictive interpretation of a convenient judicial phrase.

The respondent wife did not appear either below at the hearing in December last, or before us. The co-respondent appeared below in person, but not before us. After hearing evidence Hodson J. thought it right to ask that the case should be argued on behalf of the King's Proctor, and that course was followed at an adjourned hearing in April last, the Attorney-General, Mr. Holroyd Pearce with him, arguing as amici curiæ. The same course was followed before us and the court is greatly indebted to Mr. Havers, for the King's Proctor, who reviewed the statute and case law fully, but with admirable conciseness.

The logical, and I think the legal, questions involved in this appeal may perhaps be stated thus: (1.) Is it a principle of divorce law that condonation is an absolute bar to future proceedings based on the matrimonial misconduct which occurred before and was the subject of the condonation, or may the right to proceed on that misconduct be subsequently

C. A.
1945
BEARD v. BEARD.
Scott L.J.

"revived," and the bar of condonation removed, by fresh matrimonial misconduct? In other words, is condonation absolute and final, or only conditional and provisional? (2.) If condonation is conditional and the rule of "revival" is good law, is that rule brought into operation by any matrimonial misconduct (other than such a minor degree of misconduct as should be disregarded either on the de minimis principle, or because the Divorce Court does not regard it as sufficiently serious to treat it as misconduct) or only by such misconduct as would of itself justify the court in granting a decree for it alone? [His Lordship then stated the facts and the findings of Hodson J., taken from his judgment and continued:] The jurisdiction of, and the law applied by, the Probate, Divorce and Admiralty Division, sitting in Divorce, is purely statutory, but by the combined effect of s. 6 of the Matrimonial Causes Act, 1857, of the Judicature Acts and of s. 21 of the Supreme Court of Judicature (Consolidation) Act, 1925, the whole of the matrimonial jurisdiction of the ecclesiastical courts is now vested in it: and wherever the various statutory provisions, and the decisions of the courts since 1857, have not modified the older principles of law, recourse may properly be had to the decisions of the ecclesiastical courts before 1857. To that extent the old principles continue in force. Mr. Havers addressed us as amicus curiæ, and we were glad to hear him in that capacity, but I am not sure that he was not entitled to be heard as of right under the Act of 1925, on the ground that the learned judge had made a direction under s. 181, sub-s. 1, of that Act.

The relief formerly granted by the ecclesiastical courts is clearly summarized in Rayden on Divorce (4th ed.) (introduction, p. viii, s. 5), as follows: "Desertion was "remedied not by a divorce but by a decree for restitution of "conjugal rights, disobedience to which resulted in the dis-"obeyer being pronounced contumacious and excommunicated, "though subsequently (by Ecclesiastical Courts Act, 1813) "imprisonment for not more than six months was substituted "for a sentence of excommunication." It is of cardinal importance in the present controversy to keep in mind this ancient procedure for so-called restitution of conjugal rights as the ecclesiastical remedy for the matrimonial offence of desertion. Any desertion, long or short, of sufficient reality for the court to take cognizance of it, gave rise to the jurisdiction to make the decree of restitution. The very essence of conjugal right

was then, as it is now, to insist on continuity of conjugal intercourse; and any wanton breach constituted the matrimonial offence of desertion. The notion that desertion differs in kind according as it is long or short, and that it does not constitute a "matrimonial offence" unless it continues for some period specified in some statute as entitling the Divorce Court to make some decree, is, I think, a misapprehension due to confusion of thought. From 1857 to 1937 the power of the Divorce Court to make a decree for desertion did not arise till two years desertion was established, when it might decree judicial separation. Since 1937 the court may decree divorce, but only if the desertion has lasted three years. But desertion has always been a "matrimonial offence" and was so treated by Parliament in giving magistrates a power to make orders for desertion. The statutory history of the matrimonial wrong of desertion can be stated shortly. Section 16 of the Matrimonial Causes Act, 1857, was the first enactment by which desertion was definitely made a direct or positive ground for relief. Previously it was only an indirect or negative ground, in that it was conclusive evidence that conjugal rights were being repudiated or neglected, but s. 16 made desertion lasting for two years or more ground for an order of judicial separation, and s. 21 gave magistrates' courts jurisdiction (slightly enlarged by ss. 8 and 9 of the Matrimonial Causes Act, 1858) to protect the property of the deserted wife. This magistrates' jurisdiction was further enlarged as time went on. By s. 5 of the Matrimonial Causes Act, 1884, desertion was made an express ground in the High Court for a decree for restitution of conjugal rights, and that decree carried a statutory presumption of desertion without reasonable cause, which in the case of the husband, coupled with his adultery, entitled the wife to a decree of divorce a vinculo. The Summary Jurisdiction (Married Women) Act, 1895, s. 4, treated desertion as on a par with cruelty as a ground for an order in favour of the wife, and this jurisdiction was enlarged by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1, sub-s. 2, to include (*a*) persistent cruelty, (*b*) insistence on intercourse when suffering from venereal disease, (*c*) compulsion by husband to submit herself to prostitution. Finally desertion for three years was by s. 2 of the Matrimonial Causes Act, 1937, made by itself a substantive ground for divorce at the suit of either spouse. These statutory provisions show plainly enough that desertion has been consistently treated by Parliament as a grave matrimonial wrong.

C. A.
1945
BEARD
v.
BEARD.
Scott L.J.

"Condonation" first appeared in our legislation in s. 30 of the Act of 1857, which made it obligatory on the court to dismiss any petition on being satisfied, by evidence, of condonation by the petitioner. There can be no doubt that we must treat the word in that section as being then a word of art with a well-settled meaning, and for the purpose of interpretation we must look back to the reported decisions of the ecclesiastical courts to see what in 1857 were already its meaning and its incidence. If those courts treated it as an absolute and final bar, preventing the condoning party from ever again reverting to the matrimonial wrong so forgiven and blotted out, then prima facie Parliament in 1857 used the word in that sense: see *Dent* v. *Dent* (1). If, on the other hand, those courts treated it as only conditional forgiveness of the guilty party, that is to say, as being granted upon a condition imposed by the law of the court, that the married status so preserved might again be lost if the forgiven spouse again broke his or her marriage vows and became guilty of new matrimonial misconduct, then we too ought to treat the word in s. 30 of the Act of 1857 as connoting only a conditional wiping out of the offence condoned, which would revive on the happening of the new misconduct. The latter is, I think, clearly the doctrine which the old pre-1857 cases applied to the question.

As Lord Blackburn pointed out in the leading case of Scots law, *Collins* v. *Collins* (2), marriage is a status, and its continuance or dissolution alike depend on the law of status rather than of contract. It follows that to think of the words or intentions of the spouses at the moment of condonation as if they represented a contractual compromise of proceedings for dissolution of the marriage, plus a new contract of marriage, absolute or conditional, is a misconception. It is the law of status rather than of contract which governs the position and its incidents. But that does not mean that a condonation cannot be conditional. A status may be continued in law upon a resolutive condition, equally imposed by law, which may thereafter alter the status. And it is, in my opinion, on that footing, that the old ecclesiastical courts, upon deliberate consideration, treated the continuance of the full marriage status as conditional upon no recurrence of matrimonial misconduct; and by "matrimonial misconduct" I mean conduct by one spouse, which those courts or their successors

(1) 4 Sw. & Tr. 105. (2) 9 App. Cas. 205, 234, 235

have judicially recognized under the law in force at the relevant times, as wrong towards the other spouse.

The first case to which we have been referred is *Worsley* v. *Worsley* (1). I regard that decision, given more than two centuries ago, as of primary importance, for it covers the whole ground of the present appeal. It is shortly reported and I quote it at length: "Worsley, Mulier contra Worsley, virum. "After a reconciliation fresh acts of cruelty will revive acts "of cruelty, and also of adultery. In this case several facts "of cruelty and adultery were charged by the wife in an "allegation offered by her, which were laid to have been "committed some years ago. Since that there had been a "reconciliation between the husband and wife; and since that "reconciliation he was charged in this allegation with fresh "facts of cruelty, but with no new fact of adultery. Dr. Cottrell, "for the husband, said that since he was charged with fresh "acts of cruelty since the reconciliation, they would indeed "revive the former acts of cruelty before the reconciliation; "but that since no new acts of adultery were pretended, the "former acts of that kind did not come within the rule, and "that therefore all the articles of the allegation relating to the "adultery were irrelevant, and ought to be struck out. The court "held clearly that new acts of cruelty would revive the whole, "as well the acts of adultery that were committed before the "reconciliation (though there were no new acts of this sort) as "the acts of cruelty, and that she was now as much at liberty "to charge him with these acts of adultery, notwithstanding "the reconciliation, as she would have been if there had been "no reconciliation at all." It was cited in full in *Durant* v. *Durant* (2) a petition by a wife, and Sir John Nicholl, Dean of Arches, after reading it, said (3): "I wish to hear a full "argument on the doctrine of condonation; its principles, and "the authorities respecting it. What takes off its effects, and "revives a former charge? Will any offence, short of subse-"quent adultery, namely, an approach to adultery, set aside "condonation as a bar? Will solicitation of chastity have that "effect? Must the injury be ejusdem generis? Will cruelty "revive adultery? If so, will anything short of what would "substantively and separately establish a case of cruelty? "Will an unfounded charge of adultery, of which there is not "a tittle of proof, against a mother with twelve living children,

(1) 2 Lee 572.
(2) 1 Hag. Ecc. 733.
(3) Ibid. 735.

C. A.
1945
BEARD
v.
BEARD.
Scott L.J.

" and an unjust dismissal of the wife from her husband's house, " be sufficient to revive condoned adultery ? Can condonation " be set up as an effectual bar without being pleaded ? " The learned judge's questions show how very much the various aspects of the present appeal were in his mind at the time. He finally ruled in effect that condonation is forgiveness with an implied condition that the injury shall not be repeated and that the other party shall be treated with conjugal kindness ; and that on breach of the condition the right to a remedy for the former misconduct revives. The latter part of the judgment shows how strongly that learned judge felt the justice of the rules of law upon which the doctrines of " implied condition " and revival rest.

D'Aguilar v. *D'Aguilar* (1) was referred to in *Durant* v. *Durant* (2), and, I think, accepted as a plain authority that condonation is conditional and therefore not final. *Snow* v. *Snow* (3) was a pleading case : but it was again recognized that condonation is conditional In *Evans* v. *Evans* (4), Dr. Lushington recognizes that condoned cruelty may be revived by fresh cruelty ; he added " it is not necessary that it " should be so strong as the original cruelty." In *Hart* v. *Hart* (5) the doctrine of revival was again recognized, although the subsequent cruelty, there proved, was not sufficient to revive the antecedent acts of cruelty which had been condoned. In both the last two cases it was said that the new matrimonial misconduct must, if it is to revive the condoned misconduct, be of the same kind as the former. This seems to me an artificially narrow view, and in those two cases neither *Worsley* v. *Worsley* (6) nor *Durant* v. *Durant* (2) were cited to the court. In *Bostock* v. *Bostock* (7), the Judge Ordinary, Sir Cresswell Cresswell, said this : " After an examination of the authorities " on this point, to be found in the reports of cases in " the ecclesiastical courts, I do not hesitate to declare my " opinion, that where there have been acts of violence followed " by condonation, threats subsequently uttered, if of such a " nature and so expressed as to satisfy the court that further " cohabitation would be attended with danger to the party " threatened, do constitute a sufficient ground for a decree of " judicial separation." But the decision was that the threats in that case were not serious enough to justify a decree.

(1) 1 Hag. Ecc. 773.
(2) Ibid. 733.
(3) (1842) 2 Notes of Cases (Supplement (i.).)
(4) (1843) Ibid. 470, 474.
(5) (1855) 2 Spinks 193.
(6) 2 Lee 572.
(7) 1 Sw. & Tr. 221, 224.

In *Palmer* v. *Palmer* (1), we again get back towards a pronouncement of principle: "This was a petition for dissolution of marriage at the suit of the wife, on the grounds of cruelty and adultery. The answer of the husband denied the cruelty and adultery, and, among other things, pleaded condonation of the cruelty; the reply took issue on the allegations in the answer, and further pleaded that the cruelty, if condoned, was revived by the subsequent adultery." The respondent, in effect, demurred to the reply: "Mr. Murray, for the respondent, now moved the court to direct this part of the replication to be struck out on the ground that cruelty, once condoned, could not be revived by subsequent adultery; the reviving act must be ejusdem generis." Dr. Spinks for the petitioner put forward what I regard as the true view: "Dr. Spinks, in support of the paragraph of the replication, argued that the term ejusdem generis used by Sir John Dodson in *Hart* v. *Hart* (2), must be understood of any act which would lay the foundation for a sentence in a matrimonial court; in the then state of the law desertion was not such an act. The principle of the doctrine of revival is, that all condonation is conditional. In the words of Sir John Nicholl, in *Durant* v. *Durant* (3), the plainer reason and the good sense of the implied condition is, that 'you shall not only 'abstain from adultery, but shall in future treat me—in 'every respect treat me (to use the words of the law)—with 'conjugal kindness; on this condition I will overlook the 'past injuries you have done me.' In principle it seems impossible to distinguish between adultery revived by cruelty, and cruelty revived by adultery, with respect to the state of the law before the Divorce Act." The Judge Ordinary used these words: "I cannot accede to this application. The cases cited establish that, if a marital offence which might have been the foundation of a sentence in a matrimonial court has been condoned, it is revived by any subsequent offence which might itself have been the ground of a sentence of divorce a mensa et thoro: and this on the ground that condonation is always assumed to be conditional, and the condition extends not only to a repetition of the same, but of any other marital offence which falls within the cognizance of a matrimonial court." That principle covers one aspect of the present appeal. The phrase "marital offence . . . .

(1) 2 Sw. & Tr. 61.
(2) 2 Spinks 200.
(3) 1 Hag. Ecc. 733.

C. A.
1945
BEARD
v.
BEARD.
Scott L.J.

"within the cognizance of a matrimonial court" deserves notice, for it was less than two years after the Matrimonial Causes Act, 1858, had increased the powers of the Divorce Court in connexion with desertion, which was expressly treated in both that Act and the principal Act of 1857 as a marital offence within the cognizance of the court. *Palmer* v. *Palmer* (1), however, leaves undecided the particular question on which Hodson J. differed from Pilcher J., namely, whether the marital "offence" which will revive the condoned misconduct must reach such a degree of gravity as of itself to justify a decree by the court. *Winscom* v. *Winscom* (2), is relevant on that very question. Intimacy falling short of adultery was there regarded as sufficient to revive an antecedent condoned adultery. *Dent* v. *Dent* (3), is an authority for the proposition that a difference of kind between the new and the old matrimonial misconduct will not prevent the new from reviving the old. It is the generic quality of the conduct that matters, not its specific kind. The learned judge in his direction to the jury there said (4): "It is said on the part of the husband, that "the adultery committed by him was condoned or pardoned "by the wife. It is very properly admitted by the Queen's "Advocate that the adultery of the husband was condoned by "the wife; and you will have no difficulty in finding that issue "for the respondent. But then it is said, that although that "adultery was condoned, the condonation was done away "with by the subsequent misconduct of the husband. Now "the rule of law is, that all condonation is conditional, and the "condition is, in future you shall treat me as a husband ought "to treat his wife; and if you hereafter break your matrimonial "obligation, and are guilty of adultery or of cruelty, the con-"doned offence is revived. The question for you is, whether "there was any subsequent cruelty by the respondent which did "away with that pardoning or condonation. The pardoning "having taken place in 1861, there is evidence that in 1864 "the husband was guilty of cruelty. If you are satisfied of "that fact, you will find that, although the wife did pardon "the husband's adultery, there was subsequent cruelty "committed by the husband which revived that adultery."

In *Newsome* v. *Newsome* (5), Lord Penzance said: "Con-"donation in its ordinary acceptation is a forgiveness by the

(1) 2 Sw. & Tr. 61.
(2) 3 Sw. & Tr. 380.
(3) 4 Sw. & Tr. 105.
(4) Ibid. 106.
(5) L. R. 2 P. & D. 306, 311.

" wife implied from her restoring her husband to the original " position which he occupied before the condoned offence was " committed. When the husband is restored to his original " position the law implies forgiveness, but forgiveness of a " peculiar character, because it is coupled with the condition " that the husband shall not in future be guilty of any marital " offence. The whole doctrine of condonation—a very useful " doctrine no doubt—is a structure of the courts founded on " the necessities of the case. But the question does not arise " here, for the parties have entered into a written agreement, " and whatever ground there may be for saying that the wife " forgave the husband must be found in the agreement itself, " which supersedes any presumption of law, and the conduct " of both parties must be referred to that agreement." That learned judge added (1) : " In answer to this it was argued that " incestuous adultery which had been condoned could not be " revived by ordinary adultery. That depends on the " condition which the court implies in cases of condonation. " When a wife condones a husband's incestuous adultery, what " is the condition upon which the condonation is to protect " him against a suit ? The condition must be the same as in " all other cases of condonation, namely, that the husband shall " not be guilty of adultery or of any other marital offence. " When incestuous adultery is condoned, I think the condition " is not merely that the husband shall not again commit " incestuous adultery, but that he shall be true to his marriage " vows." That case is important because the decision rests on broad principles. Sir James Hannen P. expressed the same view in *Ridgway* v. *Ridgway* (2). There he held that solicitation of chastity revived not only previous adultery—with which it is ejusdem generis—but also cruelty, a matrimonial wrong generically dissimilar. The same learned judge propounded the same broad rule in *Blandford* v. *Blandford* (3). He said : " There had therefore been legal desertion for the requisite " period, and the petitioner would have been entitled, by reason " of the adultery and desertion, to institute a suit for dis- " solution of marriage. . . . . But the letters show that she " forgave him on condition that he ' sinned no more,' and that " is the legal definition of condonation. It is forgiveness upon " condition that no matrimonial offences shall be committed " for the future. It has been held in the cases cited that where

(1) L. R. 2 P. & D. 312.
(2) 29 W. R. 612.
(3) 8 P. D. 19, 20.

C. A.
1945
BEARD
v.
BEARD.
Scott L.J.

"the right has thus accrued from a combination of matri-
"monial offences to have the marriage dissolved, if one of these
"offences is committed again, that combination is revived.
"Adultery revives cruelty, cruelty revives adultery, and I can
"see no reason in principle why subsequent adultery should not
"revive the right of the wife to complain of the desertion as
"well as of the adultery of the past."

In Scots law condonation is final and unconditional. The observations of Lord Blackburn in the Scottish case of *Collins* v. *Collins* (1), upon the English rule are therefore obiter: and indeed he assumed the English rule of revival which he personally criticized, as too well established to be overruled judicially. In *Moore* v. *Moore* (2), Gorell Barnes J. accepted *Dent* v. *Dent* (3) as good law on "revival of a matrimonial "offence," and treated Lord Blackburn's observations as not overruling it. *Houghton* v. *Houghton* (4) is important in the present appeal because it was an express decision that desertion can revive a condoned adultery. It is true that the desertion there was of sufficient length to enable the Divorce Court to grant a judicial separation, the only direct relief open before the Act of 1937, but that qualification of that decision is irrelevant in the present appeal, except on the secondary contention based on the meaning of the phrase "matrimonial offence," namely, that if misconduct is to cause a "revival" it must amount in degree to an offence for which a decree of divorce or at least some other decree can be given. The whole of the judgment of Sir Francis Jeune P., is directly relevant. He said (5) inter alia "The principle is as clear as possible. "When the law speaks of condonation and revival, it means that "the offence is condoned on the condition that there shall be in "the future a proper compliance with the matrimonial decencies "and duties, and a person who goes back to live with his or "her guilty spouse goes back on that implied condition alone. "Desertion is as serious a matrimonial offence as can be "imagined, because it probably results in breaking up the "matrimonial home" and expressly following *Dent* v. *Dent* (3), treated that case as covering desertion just as much as adultery or cruelty. He added: "I think I am justified in holding "that the Act of 1857 is as efficacious to revive by subsequent "desertion as it is to revive by subsequent cruelty or adultery.

(1) 9 App. Cas. 205.
(2) [1892] P. 382, 384.
(3) 4 Sw. & Tr. 105.
(4) [1903] P. 150.
(5) Ibid. 152, 154.

" I am prepared to take this step on principle—a principle " which may be said to be to some extent supported by judicial " authority, or, at any rate, not to be contradicted by it." Gorell Barnes J. followed *Houghton* v. *Houghton* (1) in *Copsey* v. *Copsey* (2), calling desertion a continuing offence (just as a nuisance at common law may be called a continuing offence). Lord Merriman P. in *Jordan* v. *Jordan* (3) discusses the nature of " desertion " in divorce law, in a passage which, in my respectful opinion, covers the whole question raised by the present appeal with great force and perfect clarity. He then sums it up in these words: " But it is clear from the Act of 1857 itself that " the offence of desertion was from the first regarded as existing " independently of the period of its duration, for by s. 21 " ' a wife deserted by her husband ' may obtain protection of " her property ' at any time after such desertion ' ; and, until " the references to the Divorce Court in that section were " repealed by the Judicature Act, 1925, she could resort not " only to the justices but to the Divorce Court for the purpose."

Pilcher J. in *Higgins* v. *Higgins* (4) held, in accordance with the view which I think right, that desertion for less than the statutory period of three years sufficed to undo a preceding condonation and revive the other spouse's right to a decree for the antecedent misconduct which had been condoned. No authorities seem to have been cited, but that learned judge referred to *Jordan* v. *Jordan* (3) as authority for the view which he took. Barnard J., on the other hand, in *Ainley* v. *Ainley* (5) refused to follow *Higgins* v. *Higgins* (4) and held that matrimonial misconduct does not undo a condonation and cause the former misconduct, which, ex hypothesi, but for the condonation, would have entitled the aggrieved spouse to a divorce, to revive. The learned judge drew attention to the confusion which had arisen from the expression " matrimonial " misconduct," but took the view that for the doctrine of revival it must be such as of itself to warrant a decree. He relied in support of his view on a phrase of Viscount Simon L.C. in *Henderson* v. *Henderson* (6) : " . . . . if the spouse who had " been forgiven past matrimonial offences is proved to commit " a further matrimonial offence in the future, then the past " offences are revived and become available as further ground " for a divorce, but condonation cannot be treated as cancelled

(1) [1903] P. 150.
(2) [1905] P. 94.
(3) [1939] P. 239, 251.
(4) [1943] P. 58, 60.
(5) [1945] P. 27, 28.
(6) [1944] A. C. 49, 54.

C. A. 1945 BEARD v. BEARD. Scott L.J.

"because an erring wife who makes promises as to her future "conduct withdraws the promise later on. Condonation is "not a contract in which one party may claim to be discharged "by the other's repudiation. Condonation is not a contract "at all." But the Lord Chancellor was there dealing with an argument based upon the contention that condonation was a contract of forgiveness, and pointing out its fallacies. His Lordship was not addressing his observation to the question upon which Barnard J. differed from Pilcher J., and I cannot think he was intending to make any pronouncement upon that issue. Barnard J. was obviously impressed by the possibility of the principle upon which Pilcher J. founded his judgment being applied in a very extreme case. That possibility is necessarily present, but equally extreme possibilities are inherent in the view endorsed by Barnard J. and Wallington J. Where the post-condonation offence is desertion, the adoption of Hodson J.'s principle would have the practical effect of depriving the revival rule of any practical value, for it would not operate till the desertion had lasted long enough to make it superfluous. But in truth comparison on grounds of public policy is for Parliament, which can legislate, rather than for the courts. The trend of judicial decision from 1730 onwards till the present year has been to uphold the rule that the bar of condonation continues only so long as the matrimonial conduct of the repentant spouse continues to be such as the Divorce Court can accept as consistent with matrimonial duty, and that when a fresh matrimonial wrong is done the condonation ceases to confer protection and the right of the other spouse to proceed in the Divorce Court revives.

In my opinion any other rule of law would not only be socially intolerable, but inconsistent with the real principle underlying the long line of cases and expressly mentioned in several of them though in slightly varying language, namely, that there must be no substantial digression from the path to which their marriage vows have bound the parties, of what is sometimes called in old but telling words "conjugal kindness." A "matrimonial" or "marital offence within the cognizance "of the Divorce Court" in my opinion simply means conduct which in the eye of that court is wrong, whether it does or does not reach the duration, or gravity, or completeness which is necessary to permit of a decree, provided always that it be sufficiently serious for the court to regard it as a substantial breach of duty. For these reasons I agree with the view of

Pilcher J. and in spite of the differing views of Barnard J., Wallington J. and Hodson J., think that this appeal must be allowed, with the usual consequences on costs. I would give leave to appeal to the House of Lords were there a party to prosecute it. As there is not, I have stated my reasons and quoted from the authorities as fully as I could.

Since writing the above judgment I have read and given deep consideration to the dissenting judgment of Vaisey J. Its matter is intensely interesting and its reasoning very powerful, provided always that its partly unexpressed first premiss be conceded; but it is there that in my respectful opinion it breaks down. The falseness of its first premiss makes its conclusion erroneous. He assumes, and almost asserts, that the matrimonial law of Engand to-day still approaches the marriage status from what I may for brevity call "the sacra-"mental" angle, so that it regards a condonation as the equivalent of a new marriage, to the status of which the past sins of the bride and bridegroom have no relevance: for ex hypothesi they, the parties there, owed no duty to each other. In such a new married status there can be no revival of a past breach, for there was no duty. Such being the true nature of condonation it follows, says Vaisey J., that the party sinned against must be deemed in law, as in religion, to have forgiven the sin of the sinner for ever. I appreciate the force of the word "remisisse," which he quotes in his argument based on the above religious premiss; but I venture to call that premiss fallacious in law to-day, at any rate because of the secular characteristics of the marriage status engrafted on it by the legislation which began in 1857. But I venture, in spite of his great knowledge of ecclesiastical law, to go further, for in my opinion the views expressed in those decisions of the ecclesiastical courts themselves, which I have quoted, are inconsistent with the postulate which he makes his first premiss; in order, quite logically, to draw from his conclusion that the whole doctrine of conditional condonation, with its corollary of "revival," never really was a part of the law of the ecclesiastical courts.

In conclusion let me say that I should not have added this rider to my judgment had I thought this case could go, as I would wish, to the House of Lords for revision.

LAWRENCE L.J. The fundamental question in this case is whether in divorce law condonation is absolute and

C. A.
1945
BEARD
v.
BEARD.
Lawrence L.J.

unconditional. If it is, then the doctrine of revival of matrimonial offences by other matrimonial offences after condonation has no practical existence. If it is not, then condoned matrimonial offences must be capable of revival by offences of a less serious nature which would not by themselves give ground for divorce, otherwise the condition is nugatory and the revival unnecessary. Since the year 1730 many of the greatest authorities on the laws of matrimony and divorce have expressed the view that condonation is conditional and that matrimonial offences can be revived after condonation by offences of a less serious nature, which do not by themselves give ground for divorce, namely, by Lord Stowell in *D'Aguilar* v. *D'Aguilar* (1) ; by Sir John Nicholl in *Durant* v. *Durant* (2) ; and by Dr. Lushington arguendo in that case and in *Snow* v. *Snow* (3) ; by the Judge Ordinary in *Winscom* v. *Winscom* (4) ; in *Dent* v. *Dent* (5), and *Newsome* v. *Newsome* (6) ; by Lord Hannen in *Ridgway* v. *Ridgway* (7), and *Blandford* v. *Blandford* (8) ; and by Gorell Barnes J. in *Moore* v. *Moore* (9) (where he distinguished the Scottish case of *Collins* v. *Collins* (10), and in *Copsey* v. *Copsey* (11). I see no reason for disregarding the principles laid down by these eminent authorities in the eighteenth and nineteenth centuries, at a time when the attitude of the legislature to divorce is so fundamentally altered.

Our attention was called by Vaisey J. at the hearing to Oughton's Ordo Judiciorum, vol. I., tit. CCXIV., where the Latin word remisisse is used in conjunction with the word condonasse to describe condonation, but even if the use of the word remisisse indicates that the learned author thought that the doctrine of condonation was not conditional, I cannot think that his opinion ought to be adopted in preference to the authorities which have been cited. In my own view, apart from authority, the conditional nature of condonation is justified by the fact that it proceeds not from any person or authority other than the spouses but from one of the spouses who is intimately and personally concerned in the future matrimonial conduct of the other spouse. In the present case

(1) 1 Hag. Ecc. 773.
(2) 1 Hag. Ecc. 733.
(3) 2 Notes of Cases (Supplement i.).
(4) 3 Sw. & Tr. 380.
(5) 4 Sw. & Tr. 105.
(6) L. R. 2 P. & D. 306.
(7) 29 W. R. 612.
(8) 8 P. D. 19.
(9) [1892] P. 382.
(10) 9 App. Cas. 205.
(11) [1905] P. 94.

Hodson J. found the desertion by the wife after condonation proved, and although the desertion had only continued for three months at the date of the petition, desertion is in my opinion a serious matrimonial offence even when it has not continued for the period necessary to give ground for divorce, and that it is so regarded by the legislature is shown by s. 16 of the Matrimonial Causes Act, 1857, s. 6 of the Matrimonial Causes Act, 1858, s. 5 of the Matrimonial Causes Act, 1884, s. 178 (3) (*c*) of the Judicature (Consolidation) Act, 1925, and by s. 4 of the Matrimonial Causes Act, 1937 (see also *Jordan* v. *Jordan* (1).) I agree therefore that this appeal ought to be allowed and the prayer of the petitioner granted.

VAISEY J. I find myself, with regret, in disagreement with my Lords, and would dismiss this appeal, adopting the reasoning of Hodson J. in the court below, of Barnard J. in *Ainley* v. *Ainley* (2), and of Wallington J. in *Harrison* v. *Harrison* (3), and overruling *Higgins* v. *Higgins* (4). In approaching this matter it is, to my mind, important at the outset to observe how greatly the consequences of reviving a condoned matrimonial offence would seem to have varied according to changes in the law from time to time, and I propose to deal as briefly as I can with three successive periods. In the first period, prior to 1858, divorce, as we now use the word, could not be judicially decreed, but could only be statutorily enacted by Parliament; for the ecclesiastical courts, having then the sole jurisdiction in matrimonial causes, could only decree what we now call a separation, leaving the status of the parties as married persons for the most part unaffected. Even more important is the fact that such a decree could never be claimed as of right, but was always in the discretion of the court. In those conditions, the question whether a condoned offence could be revived was chiefly, if not solely, a question of pleading and of evidence. Thus in the earliest of the cases cited to us, *Worsley* v. *Worsley* (5), the decision was merely that the wife was "at "liberty to charge" her husband with the condoned offence; it by no means followed that she would thereby obtain a decree, and indeed we know that this particular case never proceeded to sentence: see per Lord Stowell in *D'Aguilar* v. *D'Aguilar* (6). All that the revival did was to allow the condoned offence to

(1) [1939] P. 239, 251.
(2) [1945] P. 27.
(3) Unreported.
(4) [1943] P. 58.
(5) 2 Lee 572, 573.
(6) 1 Hag. Ecc. 773, 782.

C. A.
1945
BEARD
v.
BEARD.
Vaisey J.

be brought, as it were, into the picture of the conjugal relationship ; both the offence itself and its condonation were made part of the story, enabling the court to pay such attention to it as it deserved, and no more. Lord Stowell puts it thus in *Ferrers* v. *Ferrers* (1) : " Condonation is merely retrospective ; if the " offence forgiven is afterwards renewed, the party has a right " to revert to former facts . . . . in conjunction with later."

I come to the second period, from the passing of the Matrimonial Causes Act, 1857 to 1923. Two vital changes are to be noticed ; first, the new jurisdiction to decree divorce in the proper sense, and thereby to destroy or at least fundamentally affect the status of the parties, and secondly, what is even more important for the present purpose, the substitution for the discretionary powers of the superseded ecclesiastical courts of a positive obligation on the court to pronounce such a decree on proof of adultery on the part of a wife, or of adultery plus cruelty on the part of a husband ; see s. 31 of the Matrimonial Causes Act, 1857. In these conditions, the revival of a condoned offence was mainly, if not exclusively, material when one of the two acts which form the component parts of the husband's offence had been committed and condoned, and the other of such acts was committed afterwards. The position was that the wife could only divorce her husband on proof of his being a cruel adulterer, and when he had supplied her with half the proof and had been forgiven, it was not unreasonable that she should be allowed to revert to it when he supplied the other half.

I wish at this point to refer, not, of course, as an authority but with a view to making my meaning clear, to the short paragraph relating to this matter in the Report of the Royal Commission on Divorce and Matrimonial Causes. Of that commission the first Lord Gorell was chairman, and he signed the report, which was presented in 1912, the paragraph in question being No. 375. It reads as follows : " The Defence of " Condonation. This is the blotting out of an offence, with " knowledge of the facts, not by mere forgiveness, but by such " conduct as amounts to a resumption of the married life. It is " a complete answer to a charge, but if a subsequent marital " offence is committed, it is held that the condoned offence is " revived, the condonation being treated as conditional upon " proper future conduct. It was suggested by Sir Edward " Clarke K.C., that there should, in no case, be a revival of a

(1) (1791) 1 Hag. Ecc. 781 (Note).

" condoned offence. If grounds of divorce such as we " recommend are adopted, the point does not become of much " importance, because these questions arise chiefly in cases of " suits by women, where two offences have to be proved " to found a suit, e.g., cruelty and adultery in a wife's " suit. If one offence has been condoned, and another of a " different kind is committed, the present rule permits of both " being proved, but this will be unnecessary, if the one is " sufficient foundation for the suit. Moreover, in cases of " cruelty, condonation of first acts is natural, and, if all proof " of these acts be shut out, a culminating act of cruelty might " not by itself be sufficient proof of cruelty. It might be " productive of hardship in cases of cruelty, if the doctrine of " revival were departed from. We think that there is not " sufficient ground for making any change in respect of this " doctrine." On that paragraph I desire to make one or two observations. Sir Edward Clarke's views upon what he calls " the very mischievous state of things set up by the existence " of the present doctrine," that is to say the doctrine by which a condoned offence is revived " because," as he puts it, " of the " occurrence of some minor matrimonial offence afterwards," are expressed in his answers to questions No. 42135 and 42233 in the third volume of the evidence, but the main point that I should wish to make is that the recommendations of the report have, in fact, now been altogether adopted, as to part in 1923 and as to the rest in 1937, and the commissioners quite evidently expected that when that happened the doctrine (that is of revival) would lose its importance and become unnecessary. This expectation pre-supposes (as it seems to me) that the law would be as it is declared to be by the judgment under appeal, and not as it will be held to be when that judgment is reversed. The part of the paragraph which relates to cases of cruelty exactly expresses what appear to me to be the fundamental differences between adultery and cruelty as matrimonial offences, and I wish what I am saying in this judgment to be considered as applicable only to the particular kind of condoned offence with which we are concerned in this case, namely, adultery.

I come to the third period, from the passing of the Act of 1923 to the present time. This really consists of two periods; the first ending on December 31, 1937, during which period adultery alone committed by either sex was a sufficient ground for divorce, and the second, beginning with the coming into

C. A. 1945 BEARD v. BEARD. Vaisey J.

operation of the Matrimonial Causes Act, 1937, and continuing to the present time, when desertion and cruelty have been additional independent grounds, full effect having thus been given to the whole of the recommendations of the Royal Commission. That being so, I think that there is no longer any room for the use of the doctrine of revival in such a case as that with which we are now dealing. Condonation appears to me to rest on sound legal, moral, and logical principles; to be entirely consistent with reason and fairness; and to be in the interest as well of the individuals immediately concerned as of the public. I find the doctrine of revival much less easy to explain and to justify, and I have sought in vain for its historical origin. At first sight it is surprising that works of high authority, such as Ayliffe's Parergon (1726), p. 226, and Oughton's Ordo Judiciorum (1738), vol. I., tit. CCXIV. (2), p. 317, when dealing with the subject of condonation, make no reference whatsoever to its conditional quality, and do not deal at all with any doctrine of revival. I believe the explanation to be that while condonation is a principle of law, revival was originally at any date no more than a rule of practice in the ecclesiastical courts, relating to pleading and evidence, as I have already said. Both rules (of condonation and of revival) were imported into the rather alien procedure of the courts established under the Act of 1857, and applied thenceforward in the manner which I have tried to explain. It matters not now that Sir Edward Clarke thought that the doctrine of revival operated mischievously, if it be true (as for my part I think it is) that the rounding off, as it were, of the grounds for divorce by the Acts of 1923 and 1937 has removed, as the Royal Commission thought that it would, all occasion for the application of the principle of revival in such a case as the present. I do not doubt that condoned offences may be revived in cases of cruelty, and in other cases also, to complete a picture, but I do not think they can be revived to convict the offender by their own force, as is suggested on the present appeal. In my view the principal of revival exists, but has become of extremely limited application, and in any case does not apply here.

I do attach some importance to Oughton's use of the word "remisisse" in conjunction with the word "condonasse" in the passage to which I have referred. For the terminology of the ecclesiastical courts had very close association with theology, and the "remissio peccatorum" of the Creeds undoubtedly implied finality. Neither in classical nor in

mediæval Latin is there any word, so far as I know, which expresses more strongly and definitely than do remissio and condonatio the absolute and irrevocable quality of release, the primary significance of the former word being legal and of the latter moral. I may mention that the best exposition which is known to me of the principles involved in this appeal is to be found in the American treatise, Bishop on Marriage and Divorce (published in New York, 1891), vol. II., book IX., ch. 10, ss. 267 to 366. My Lord has dealt very fully with the reported cases, and as to these I need only say that for my part I find nothing in them which would have precluded this court, had it been so minded, from arriving at the conclusion which I am venturing, with all due deference, to express.

Some of the consequences which will follow the success of this appeal are, I think, surprising. I dare to suggest that when a wife or a husband condones the other's offence, and particularly the offence of adultery, by the resumption of sexual intercourse with full knowledge (which Oughton (ubi supra 317) calls notitia probabilis, and appears to identify with scientia) of the offence, the marriage not only ought to be, and is meant to be, but actually is, re-consummated, re-consecrated, and in the fullest sense re-habilitated. I believe that in the vast majority of such cases the intention and purpose of both is to re-establish the marriage as securely as it was established before. "Let us not refer to this again," would be their thought, "let things be as if it had never happened." Now I am quite aware that condonation does not lie in contract, but arises by operation of law, yet at least such a purpose as I have attributed to the parties would be praiseworthy, and I do find it very hard to believe that the law is compelled (with what seems to me to be incredible cynicism) to frustrate it. Must these people really be told that the law actually forbids them to re-establish their marriage on any other than a precarious basis; that they were mistaken in supposing that they had thrown into the sea—twenty years before, it may be—the hatchet that might then have severed their lives; and that the hatchet was in fact (without their knowledge and contrary to their wishes) buried in quite a shallow grave, and has lain there ready to be disinterred, for use with fatal results, on the happening of comparatively slight matrimonial misconduct in the future? I hope that I may be excused for the homeliness of the illustration of the buried hatchet. But the matter goes further still, for the revival of the ancient wrong would to-day leave the

C. A. 1945 BEARD v. BEARD. Vaisey J.

court no option. Given the act of adultery, however long ago, and given a month's desertion now, the court has no option or choice, or discretion, and the decree of divorce a vinculo must inescapably and automatically follow. I have the greatest difficulty in persuading myself that this can be the law, and that the invariable consequence of, and penalty for, a condoned offence is a lifelong period of probation, rendering the offender liable to be called up for inevitable judgment thereon if he or she commits any other conjugal offence whatsoever at any time, however distant, thereafter. With all respect to those who think otherwise, there seems to me to be something almost inhuman in a law which enables a wife or a husband to obtain, as of right, a divorce from the other in their old age, upon the ground of one single act of adultery committed by that other in the time of their far off youth and immediately condoned, but now raked up from the past upon some petty provocation insufficient in itself to be a ground for the relief so tardily sought. No statute of limitation applies to such a case, no plea of acquiescence or delay or unreasonableness could avail, nor could the court draw any distinction between a single act of adultery committed under exceptional temptation, and a series of such acts of a really heinous character. In the circumstances of the present time, there must be many husbands and wives who have erred and been taken back, and I cannot but think that it would be in the public interest that they should hold their forgiving spouses upon a firm rather than a precarious tenure. The question before us, however, is what the law is and not what it ought to be, and these considerations are only to my mind material to be mentioned as tending to make it at least probable that the law was correctly interpreted and applied in the court below.

I fully recognize the difficulties in the case, and the strength of the arguments which have found favour with my Lords, but in conclusion I ask leave to suggest one further consequence which has occurred to me. Suppose that a husband commits an act of adultery, that the wife condones it, and that both resolve that the condonation shall be absolute and unconditional, so as to render the offence incapable of being revived between them in any circumstances whatsoever. They might well feel a sense of insecurity if they had to live the rest of their lives together in the knowledge that an act of cruelty (for example) by itself too slight to entitle the forgiving wife to a divorce would, nevertheless, in view of what had happened

C. A.
1945
BEARD v. BEARD.
Vaisey J.

enable her to get one for the asking. Such a resolve might be thought to merit both encouragement and applause. How then are these people to obtain the security for which they seek? Only, so far as I can see, by refusing the condonation, proceeding to divorce, and then marrying each other again after the decree has been made absolute. I would dismiss this appeal.

SCOTT L.J. The appeal will be allowed. The judgment below will be set aside and a decree nisi dated as at the date when Hodson J. gave judgment.

Solicitors for appellant: *Mowll & Mowll, for Mowll & Mowll, Canterbury.*

Solicitor for King's Proctor: *Treasury Solicitor.*

W. L. L. B.

M. v. *M.* - - - - [1946] P. 31
Approved. COLQUITT *v.* COLQUITT [1948] P. 19

M. *v.* M.

1945
July 31.
Denning J.

Divorce—Decree made absolute—Husband's application for custody of legitimated child—Decree of legitimation—Whether necessary—Direction issued from Divorce Registry—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 193—*Legitimacy Act*, 1926 (16 & 17 *Geo.* 5, *c.* 60), *s.* 1.

Dictum not followe HARRISON *v.* HARRIS [1951] P. 4

The Divorce Court has jurisdiction under s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, to make an order for the custody of a child born out of wedlock but legitimated under s. 1 of the Legitimacy Act, 1926, by the subsequent marriage of the parents, though no decree of legitimacy has been obtained under that Act: for (*a*) under s. 193, parenthood and not the legitimacy of the child is the test of its applicability, and (*b*) even if the section applied to legitimate children only, a child legitimated by the subsequent marriage of the parents is a legitimate child to which the section applied.

Bednall v. *Bednall* [1927] P. 225, *Green* v. *Green* [1929] P. 101, and *Jones* v. *Jones* (1929) 45 T. L. R. 292 and the Direction of the Probate Registry based on those cases to the contrary effect not followed, as being inconsistent with the judgment of the Court of Appeal in *Langworthy* v. *Langworthy* (1886) 11 P. D. 85 and at variance with established principle and practice.

SUMMONS adjourned into court for judgment.

No counsel appeared at the hearing of the summons.

Husband's application for custody of his three children.

1945
M.
v.
M.

The parties were married in December, 1932, and in June, 1945, the husband obtained a decree absolute of divorce on the ground of the wife's adultery, and thereupon applied under s. 193 of the Judicature (Consolidation) Act, 1925 (1) for the custody of his three children. The eldest child was born three months before the marriage but in the circumstances was legitimated under s. 1 of the Legitimacy Act, 1926, by the subsequent marriage of her parents, but no decree of legitimacy had been made or applied for in respect of her under that Act. The question therefore arose whether in view of the decisions of the Divorce Court cited in the headnote and directions issued from the Divorce Registry based on those decisions (2) an order for the custody of the eldest daughter could be made.

DENNING J. in a written judgment stated the facts, said that he was satisfied that it was in the best interests of the children of the parties that the father should be given the custody and they should be brought up together, and continued: Apart from authority, I should have thought that under the Judicature (Consolidation) Act, 1925, I have power to give the petitioner custody of the eldest child as well as of the other two. The powers conferred by s. 193 are not confined to children of the marriage, but apply to " children the marriage of whose

(1) Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 193, sub-s. 1 : " In any proceedings for " divorce or nullity of marriage or " judicial separation, the court " may from time to time, either " before or by or after the final " decree, make such provision " as appears just with respect to " the custody, maintenance and education of the children, the " marriage of whose parents is the " subject of the proceedings, or, " if it thinks fit, direct proper " proceedings to be taken for " placing the children under the " protection of the court."

(2) The Directions were as follows : 21st January, 1929. " Where a child born before " marriage is described as issue " of the marriage and the prayer " seeks the custody of such child, " the Registrar's certificate shall " be withheld until the petition " has been amended by the dele- " tion of the application for " custody."

7th June, 1929. " With refer- " ence to the Direction of 21st " January, 1929, and the reported " cases of *Bednall* v. *Bednall* " [1927] P. 225, *Green* v. *Green* " [1929] P. 101, and *Jones* v. " *Jones* (1929) 45 T. L. R. 292, it " should be noted that, in dealing " with applications for custody of " children born prior to the " marriage, the following prin- " ciples should be observed : 1. If " the child has not been declared " legitimate by a decree under the " Act, no order for custody can be " made."

" parents is the subject of the proceedings," as it is put in one place, or the "children of the petitioner and respondent," as it is put in another place. Both those expressions seem to me to make parenthood the test, not legitimacy. The difficulty arises from the cases of *Bednall* v. *Bednall* (1) *Green* v. *Green* (2), and *Jones* v. *Jones* (3), where it was held that an order for custody can only be made in respect of legitimate children. It is to be noticed, however, that s. 193 applies not only to proceedings for divorce, but also to proceedings for nullity of marriage, and in *Langworthy* v. *Langworthy* (4) (a nullity case where there never was a valid marriage), the Court of Appeal held that the section enabled the children of the union to be provided for. That decision was not cited in any of the three cases, and it seems to me to show that the test under s. 193 is parenthood, not legitimacy. Assuming, however, that it is only to legitimate children that the section applies, there is ample evidence in this case that the eldest child is legitimate. She was not born legitimate, but she was legitimated by the subsequent marriage of the parents. The facts in evidence, which are not disputed, bring the case within s. 1 of the Legitimacy Act, 1926.

The next difficulty, however, is that according to those self-same cases I am not at liberty to find those facts in this proceeding, because it is said that a finding of legitimacy can only be made when the child herself and other interested persons are before the court. The result of those cases is expressed in the direction issued in the Divorce Registry, which says that " if the child has not been declared legitimate " by a decree under the Act, no order for custody can be " made." In other words, the child herself must, by a next friend, petition for a decree of legitimacy, making the Attorney-General a party and any other persons whom the court may direct, and must go to all the expense and delay of obtaining a decree of legitimacy before an order for custody can be made. I see no justification for that view. An order for custody does not involve a finding in rem that the child is legitimate. It is only a decision in personam, as between the parents, which parent should have the custody of the child : see *Thomassett* v. *Thomassett* (5). If it is necessary to find that the child is legitimate, the finding can be made in these proceedings as

(1) [1927] P. 225.
(2) [1929] P. 101.
(3) (1929) 45 T. L. R. 292.
(4) (1886) 11 P. D. 85.
(5) [1894] P. 295, 301.

1945

M.
v.
M.

Denning J.

between the parents without binding the child or anyone else.

Apart from the Divorce Court, I know of no court in this country which has refused to find that a child is legitimate simply because a decree of legitimacy is not produced. The Divorce Court has only so refused since 1927, and then only in cases where the child has been legitimated by the subsequent marriage of its parents. I see no reason for putting such children under such a disability. There is nothing in the Legitimacy Act, 1926, which makes the obtaining of a decree a condition precedent to legitimacy. Once the parents are married the child acquires the status of legitimacy as fully as a child born legitimate. The only difference between a child born before, and one born after, marriage is that in the former case, in order to prove legitimacy, there must be evidence of parenthood while both parents are unmarried, whereas in the latter case there is a presumption of legitimacy. In either case the obtaining of a decree is not a condition precedent to legitimacy, and where, as here, the parenthood is not and never has been in dispute, it may be quite unnecessary. The procedure to obtain a decree of legitimacy was introduced in 1858, and it is nothing more than a means of ascertaining and recording legitimacy, if desired. Long before 1858, and also since, the courts of this country have habitually decided questions of legitimacy, whenever they arise, as between the parties to a cause, without more ado, whether the child be represented or not. Familiar examples can be found in ejectment cases concerning the title to land, in poor law cases concerning the settlement of paupers, in affiliation and maintenance cases, and in cases where a claim is made to a fund or an estate. The Divorce Court itself has acted on the same basis. There are two reported divorce cases where the courts have, on an application for custody, decided questions of legitimacy as between the parents, without the presence of the child or the Attorney-General: see *Gordon* v. *Gordon and Bell* (1) and *Gordon* v. *Gordon and Granville Gordon* (2), which was approved by Lord Sumner in *Russell* v. *Russell* (3). In those two cases the children were born during wedlock, but there is no reason why the same course should not be taken in cases of children born before marriage. The courts, other than the Divorce Court, have made no distinction between the two classes. They have often found a child to be legitimated by

(1) [1903] P. 92. (2) [1903] P. 141. (3) [1924] A. C. 734–5.

1945

M.
v.
M.

Denning J.

the subsequent marriage of its parents without the necessity of any decree of legitimacy. For more than a century they have done so in cases where the law of the father's domicile at the time of the birth and at the time of the subsequent marriage recognizes such legitimation. Since 1926 they have also done so when the father's domicile is in England at the time of the subsequent marriage : see, for instance, *Re Lowe* (1), *Re Hepworth* (2), and *Re Wicks Marriage Settlement* (3).

What, then, ought I to do ? The decisions of other judges of first instance are not absolutely binding on me, but it is my duty to follow them in the absence of strong reasons to the contrary. One of the strongest of such reasons is inconsistent decisions by other judges, for then I must decide which of them I ought to follow. I think that the decisions of the Divorce Court of *Bednall* v. *Bednall* (4), *Green* v. *Green* (5), and *Jones* v. *Jones* (6), and the directions that have been founded on those cases, are inconsistent with the decision of the Court of Appeal in *Langworthy* v. *Langworthy* (7), which shows that under s. 193 of the Judicature (Consolidation) Act, the test is parenthood, not legitimacy, and also with the established principle that a child can be found to be legitimate without the necessity of a decree of legitimacy. There are sometimes special reasons why the courts should follow decisions of long standing, even though they think them to be wrong ; but none of those reasons apply here. Relieved of those three cases, I give the custody of the eldest child, as well as of the other two, to the father.

Solicitor for the husband : *W. F. Gillham, for L. J. Slade, Newent, Gloucestershire.*

Solicitors for the wife : *Haslewood, Hare & Co.*

(1) [1929] 2 Ch. 210.
(2) [1936] 1 Ch. 750.
(3) [1940] Ch. 475.
(4) [1927] P. 225.
(5) [1929] P. 101.
(6) 45 T. L. R. 292.
(7) 11 P. D. 85.

V. J. M. S.

Overruled. BAXTER v. BAXTER. [1948] A. C. 274

Not followed. CACKETT v. CACKETT [1950] P. 253

C. A.

1945

June 29; *July* 16.

Scott, du Parcq and Morton L.JJ.

COWEN *v.* COWEN.

Divorce—Wife's petition—Nullity—Agreement between parties to prevent pregnancy while resident in Persia—Subsequent wilful refusal of husband to permit wife to bear children—Persistent use of contraceptives by husband—Coitus interruptus—Marriage not consummated—Matrimonial Causes Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 7, *sub-s.* 1 (*a*).

The parties, who were married in 1932, mutually agreed that while they were compelled by the husband's occupation to reside in Persia they would take steps for the prevention of conception by the use by the husband of a contraceptive sheath. When they returned to England in 1937, and also after they had gone back to Persia (where medical conditions had greatly improved) the wife, who desired to bear a child, repeatedly urged the husband to live a normal married life, but he refused and persistently used contraceptives or occasionally, when these were not obtainable, practised coitus interruptus. In 1944 the wife left the husband and brought proceedings for a decree of nullity on the ground that the marriage had never been consummated :—

Held (reversing the decision of Pilcher J.), that the facts sufficiently explained and justified the wife's consent, for a limited period only, to the use of contraceptives; that there had never been complete sexual intercourse within the true meaning of the term and therefore the marriage had not been consummated and that therefore the husband's refusal entitled the wife to a decree.

APPEAL from Pilcher J.

Petition by wife for a decree that her marriage was null and void on the ground that it had not been consummated because of the wilful refusal of the respondent husband to consummate it within the meaning of the Matrimonial Causes Act, 1937, s. 7, sub-s. 1 (*a*) (1).

The material facts are set out in the headnote and the judgment of the court.

Pilcher J., on April 24, 1945, dismissed the petition. The wife appealed.

Beyfus K.C. and *Bussé* for the petitioner. Pilcher J. was wrong in holding that a marriage was consummated when penetration had been proved. The doctrine of the Church

(1) Matrimonial Causes Act, 1937, s. 7, sub-s. 1 : "In addition "to any other grounds on which "a marriage is by law void or "voidable, a marriage shall be "voidable on the ground :— "(*a*) that the marriage has not "been consummated owing to the "wilful refusal of the respondent "to consummate the marriage."

is that one of the purposes of marriage is the procreation of children. Originally the common law and the canon law were on parallel lines. Emission was an essential element in the offence of rape at common law, but by 9 Geo. 4, c. 31, and subsequently by s. 63 of the Offences against the Person Act, 1861, it was provided that it should not be necessary to prove such emission in order to establish carnal knowledge. Consequently, for over a century, proof of penetration of the female organ has been sufficient to prove carnal knowledge in criminal law, and thus in the case of marriage we start with the idea that penetration of the female organ was sufficient to consummate marriage. The first Divorce Act was the Divorce and Matrimonial Causes Act, 1857. Before that date a number of works were published including Bayle's Historical and Critical Dictionary (2nd ed.) (1737) (translated from the French) which contains an account of a Breton nobleman, Baron Quellenec, who had been the subject of a nullity suit just before he was murdered on St. Bartholomew's Day, and describes the practice of the courts in nullity suits at that time; Dr. T. R. Beck's Elements of Medical Jurisprudence (7th ed.) (1836); and Dr. Paris and Fonblanque on Medical Jurisprudence. Marriage is null and void from inception where there is impotency or incapacity. See Chitty's Practical Treatise on Medical Jurisprudence published in 1834, Part I., p. 375: "In the male it denotes an incapacity erectio "ac intromissio penis cum emissione seminis. In the female "it is limited to an impervious vagina." If that passage is right then it is decisive of the proposition for which I contend. I rely on the word "incapacity." [SCOTT L.J.: What extra light does that throw on the question here?] That Pilcher J. was wrong to say that the marriage was consummated when penetration had been proved or taken place. The emission of semen is an essential element to consummation: "erectio, intromissio, ejaculatio." Consummation imports potency. The husband would have an answer to a complaint of nullity by the wife if she insisted that he used a sheath, the use of which induced his impotence. Otherwise it would be an injustice. [Counsel referred to *D.* v. *A.* (1).] The judgment of Dr. Lushington has held the field for one hundred years. (See the headnote and judgment of Bateson J. in *Snowman* v. *Snowman* (2).) Man has created a malformation by the device and practice of using a sheath.

(1) (1845) 1 Rob. Ecc. 279. (2) [1934] P. 186.

C. A.
1945
COWEN
v.
COWEN.

Fairweather for the respondent. I only desire to address the court as amicus curiæ. This marriage is one which is to be taken, at the most, as a voidable marriage, and not one which is void ab initio. The doctrine of "approbation" or "sincerity" applies in the circumstances and on the facts as found by Pilcher J. The wife would "approbate" the sort of affairs if she consented to the practices of her husband for a period and then demanded that she should become the mother of a child. [MORTON L.J.: In the present case the consent was for a special reason and for a limited period.]

The court referred to the headnote in *G.* v. *M.* (1) and to the observations of Lord Selborne (2).]

Beyfus K.C. replied.

Cur. adv. vult.

July 16. The judgment of the court was read by DU PARCQ L.J. The wife, who is the petitioner in this case, prays for a decree that her marriage with her husband is null and void. The ground which she alleges is that, in the words of s. 7, sub-s. 1, of the Matrimonial Causes Act, 1937, "the "marriage has not been consummated owing to the wilful "refusal of the respondent to consummate the marriage." The petition was not defended. Pilcher J., who heard the case, found that the marriage had been consummated, and dismissed the petition. The facts are not in dispute or in doubt, and it is important that it should be understood that Pilcher J. accepted the wife's evidence, and that there is no hint in his judgment that he entertained the slightest suspicion of her truthfulness or sincerity. The question which he had to decide was one of law and construction. The learned judge stated the facts carefully, and we may summarize them very briefly. The parties were married in 1932. They were both young. At first they lived in Persia, and the danger of child-bearing for a European woman in Persia was then so grave that they agreed to take steps to prevent conception while they were in that country. The husband habitually used a rubber sheath when intercourse took place. In May, 1937, the spouses came to England on leave and the wife pressed her husband to abandon this precaution against conception, in order that she might have a child. He refused. From the end of 1937 until the Spring of 1939 they were in Persia, and although conditions had improved there and she was willing

(1) (1885) 10 A. C. 171. (2) Ibid. 185, 186.

to have a child, her husband persisted in his habitual practice. In the Spring of 1939 the wife came to England, and wrote a letter to her husband in which she begged him, to use her own words, to live " a normal married life " with her. He ignored this request. She returned to Persia, and the only change in their relations which took place was that, after the outbreak of war, and owing to the difficulty of obtaining such articles as the husband had previously used, he had recourse to the practice of withdrawal before emission, or coitus interruptus. This occurred on but a few occasions. Relations between the spouses became strained. The husband's reiterated refusal to give his wife an opportunity of becoming a mother led to disputes. Finally, in 1944, she left him and began the present proceedings. The learned judge expressed his opinion in the following words: " So far as I am aware, " the question of fact for consideration in every nullity case is " simply whether or not the marriage has been consummated, " and the party who wishes to establish that the marriage has " been consummated has, as far as I know, always had to show " that there has been some penetration, some effective penetra- " tion, of the female by the male organ. Once he has estab- " lished that there has been complete penetration he has made " out his case, and that quite irrespective of whether an " appliance like a sheath has been used which would effectively " prevent one of the purposes for which marriage was ordained, " namely, the procreation of children."

The Matrimonial Causes Act, 1937, contains no definition of the word " consummate," and Parliament, no doubt, intended it to be understood in the sense in which it had hitherto been employed by judges dealing with matrimonial causes in this country. Before the passing of the Act of 1937 the question whether a marriage had been consummated usually arose in connexion with the particular question whether one of the parties was lacking in capacity to consummate the marriage. Thus, it is no doubt true to say that normally the question was whether penetration by the male organ could be, and had been, effected. Before 1937, the question whether the emission of semen into the body of the female was necessary in order to constitute such complete penetration as would amount to a consummation of the marriage could only arise if, through some malformation of the husband's organs of generation, such emission was rendered impossible. In such a case we have no doubt that an ecclesiastical court would have held

C. A.
1945
COWEN
v.
COWEN.

that a husband suffering from such malformation was impotent, and that the marriage to which he was a party was voidable at the wife's instance. This, we think, necessarily follows from the generally recognized truth that one of the chief ends of marriage is the procreation of children. This truth is insisted upon by all writers of authority as fundamental to the rule that inability to consummate a marriage renders it voidable: See Oughton's Ordo Judiciorum, Title 193, s. 17; Shelford's Treatise of the Law of Marriage and Divorce, p. 201. It is true that sterility in man or woman has never been a ground for avoiding a marriage. Apart from the fact that in many cases it would even now be impossible to prove that a spouse is incurably sterile and that in earlier days such proof would almost always have been impossible, there are obvious reasons of a religious and social character why sterility should not of itself be a sufficient reason for a decree of nullity. But in order that intercourse should be complete, it is well established that there must be what Dr. Lushington referred to as "vera copula." "Sexual intercourse," he said, "in "the proper meaning of the term, is ordinary and complete "intercourse; it does not mean partial and imperfect "intercourse" see (*D.* v. *A.* (1)). We are of opinion that sexual intercourse cannot be said to be complete when a husband deliberately discontinues the act of intercourse before it has reached its natural termination, or when he artificially prevents that natural termination, which is the passage of the male seed into the body of the woman. To hold otherwise would be to affirm that a marriage is consummated by an act so performed that one of the principal ends, if not the principal end, of marriage is intentionally frustrated.

Further, we would point out that if the judgment of the learned judge were right, a wife who was ready and willing to consummate the marriage in the fullest sense, but refused to permit intercourse in a manner which deprived her of the opportunity of bearing children, would be subject to what seems to us to be an obvious and an intolerable injustice. We say this because it would seem to follow from the learned judge's reasoning that she would have no answer to a petition by the husband founded on an allegation that she had wilfully refused to consummate the marriage. With respect, we think that this reasoning is unsound, and that if a husband were bold enough to pray for the annulment of his marriage

(1) 1 Rob. Ecc. 279, 298.

on such a ground, the answer would be that it was he, and not his wife, on whom the blame for failing to consummate the marriage must rest. With regard to this aspect of the matter, it may be observed that in the precedent of a "Libel for "impotence" which is contained in Coote's Practice of the Ecclesiatical Courts, published in 1847, it is alleged that the petitioning wife was "willing to be carnally known in order "to become a mother" by her husband.

Mr. Fairweather, who addressed us as amicus curiæ, suggested that it might be proper to refuse relief to the petitioner on the ground that her conduct showed that she had acquiesced in and approved her husband's course of conduct. If the petitioner had never made any objection to the measures he adopted, or requested him to have normal relations with her, she would certainly not be entitled to the relief which she claims. It may be that relief might properly be refused to a wife who over a long period consented to such imperfect intercourse as was here proved, and only objected to it at a later date, without being able to adduce any excuse or justification for her earlier consent. Each case must be dealt with on its own facts, in the light of established principle. In the present case we are satisfied (as, we think, the learned judge was satisfied) that the petitioner had consented to the practice of which she ultimately complained for reasons which sufficiently explain her consent, and for a limited period only, and that it would be unjust to refuse her relief on the ground that she did not refuse to submit to this imperfect intercourse from the first. It is well settled that delay in itself is not a bar to relief.

For these reasons, we are of opinion that the appeal succeeds. The petitioner is entitled to the relief prayed. The appeal is allowed with costs here and below, and the judgment of Pilcher J. must be set aside.

Appeal allowed.

Solicitor for appellant: *J. Hampson Fogg.*
Solicitors for respondent: *Joynson-Hicks & Co.*

H. G.

1945

July 12, 13, 26, 27.

Pilcher J.

THE ATHELVICTOR.

Shipping—Limitation of liability—"Improper navigation or management of the ship"—Fire and explosion from escape of petrol through sea-valves—Merchant Shipping Act, 1894 (57 & 58 *Vict., c.* 60), *s.* 503—*Merchant Shipping* (*Liability of Shipowners and Others*) *Act*, 1900 (63 & 64 *Vict., c.* 32), *s.* 1.

Owing to the negligence of the plaintiffs' servants on board the tanker *Athelvictor* three sea valves which should have been closed after the discharge of cargo at Takoradi were left open and thereafter remained open at all material times. The vessel proceeded to Lagos with these three sea valves open. On arrival at Lagos the appropriate valves were opened to discharge cargo through the port pipe line. As a result of the failure of the ship's personnel to see that one or all of the sea valves above referred to were closed some sixty tons of petrol escaped from the vessel by gravity through the open sea valves and floated down the harbour on the current. When in the neighbourhood of certain Admiralty trawlers and other craft the petrol or petrol vapour became ignited by an unknown agency and a serious fire resulted. As a result of the fire a quantity of depth charges on the trawlers exploded doing damage to vessels and also to property ashore. A number of persons on board vessels and also ashore lost their lives or suffered injury.

The plaintiffs sought to limit their liability for the damage, loss of life and personal injuries on the ground that they were caused by the "improper navigation" of the ship within the meaning of those words in s. 503 of the Merchant Shipping Act, 1894, which provides that where loss of life or personal injury is caused to any person in the ship or in any other vessel or loss or damage is caused to other vessels or goods or other things on board any other vessel by reason of the "improper navigation" of the ship," the shipowner shall not be liable in respect of loss of life or personal injury either alone or together with damage to vessels, goods or other things beyond an aggregate amount not exceeding 15*l.* for each ton of the ship's tonnage.

Alternatively the plaintiffs contended that if not caused by negligent navigation, the damage to property was caused by the improper "management" of the ship within s. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, which allows the shipowner to limit his liability in respect of loss or damage to property whether on land or on water by reason of the improper navigation "or management" of the ship.

The defendants contended that the damage and loss were occasioned by the improper management of the cargo and not of the ship:—

Held, (i.) that the negligent failure to close the valves in question could not be regarded as improper "navigation," and that the plaintiffs therefore could not limit their liability for claims in respect of loss of life or personal injury; (ii.) that the narrower interpretation which had been given to the words "improper management"

in contractual or statutory exception clauses in contracts for the carriage of goods by sea did not restrict the ordinary meaning of the words in the Merchant Shipping Act, 1900, and that they covered improper management of the appliances of the ship at least when such appliances were fitted both for ship's purposes and for cargo purposes, and that accordingly the plaintiffs were entitled to limit their liability in respect of the damage done to other vessels and to property ashore.

ACTION of limitation of liability.

The plaintiffs were the owners of the motor tanker *Athelvictor*.

The defendants were the Lords Commissioners of the Admiralty, the Government of Nigeria, Elder Dempster Lines, Ld., and others.

The plaintiffs sought to limit their liability for the damage sustained by the defendants by reason of a fire and explosion which occurred at the Port of Lagos on December 5, 1942. The *Athelvictor*, a motor tank steamship, whose registered tonnage for the purposes of limitation of liability was 7,752.89 tons, was lying with her port side to the jetty at the Shell Company's wharf at Lagos for the purpose of discharging petroleum spirit. Owing to the negligent operation of certain valves on board the vessel by the ship's personnel some 60 tons of petroleum spirit were allowed to escape into the water. The petroleum spirit so released floated down stream until it was in the neighbourhood of three Admiralty trawlers and other craft which were lying at their moorings in the harbour. The petrol or petrol vapour on the surface of the water then became ignited by some agency which was not determined, and the trawlers were enveloped in flames. Their moorings were burnt and as they drifted away from the jetty a very violent explosion occurred. This explosion was caused by the detonation of a number of depth charges on board the trawlers. The trawlers capsized and sank, with some loss of life. Other craft in the vicinity were damaged and serious damage was done to property ashore. In all some sixty-eight persons were killed and a number sustained personal injuries. Some of these persons were on board craft and some were ashore at the time they lost their lives or were injured.

On the pleadings the question whether the damage had occurred with the actual fault or privity of the plaintiffs was in issue, but the point was not pursued and the hearing of the case proceeded on the footing that the damage occurred

1945

THE ATHELVICTOR.

without their actual fault or privity. It was common ground that the release of the petrol took place as a result of negligence on the part of the ship's personnel. The *Athelvictor* had discharged part of the petroleum at Takoradi, and on December 2 she left that port for Lagos, where she was due to discharge the balance of her cargo. Before leaving Takoradi sea water was used to clean out the cargo pipelines which had been used for discharging cargo. The sea water required for this operation was admitted into the vessel through a valve in the port side of the vessel, and in order that sea water entering the vessel should reach the cargo lines which it was desired to clean, it was necessary that two other sea valves should also be opened. The indicators on two of these valves were broken and it was impossible to tell by visual inspection whether the valves were open or shut. On the completion of the pipe cleaning operation the three valves should have been, but were not, closed, and the ship arrived at Lagos with the three valves still open. To discharge No. 2 centre tank through the port system the port discharging line was "set," which involved the opening of all valves connecting the tank with the port pump. On the appropriate valves being opened petrol flowed by gravity along the pipeline connecting the tank with the port pump. If any of the sea valves had been closed, no petrol would have been able to run past the first closed valve, but as all these valves had been negligently left open the petrol from the tank, once the line was "set," had an uninterrupted passage along the pipe leading to the port sea valve and through that valve into the water of the harbour. In the result after the port line was "set" some 60 tons of petrol escaped by gravity from the vessel before the situation was remedied.

F. A. Sellers K.C. and *A. J. Hodgson* for the plaintiffs. The negligence of the plaintiffs was in failing to close the sea valves, which were no part of the cargo apparatus. The omission constituted "improper navigation" within the meaning of s. 503 of the Merchant Shipping Act, 1894. See *The Warkworth* (1), a limitation case; and *Good* v. *London Steamship Owners' Mutual Protection Association* (2); *Carmichael & Co.* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association* (3); *Canada Shipping Co.* v. *British Shipowners' Mutual Protecting Association* (4), insurance

(1) (1884) 9 P. D. 20.
(2) (1871) L. R. 6 C. P. 563.
(3) (1887) 19 Q. B. D. 242.
(4) (1889) 23 Q. B. D. 342.

1945

THE ATHELVICTOR.

cases in which a wide interpretation was put upon the words "navigation of the ship." If it was not improper navigation, the negligence constituted "improper management" under s. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900. These words should be given their ordinary and natural meaning, and the narrow construction put upon similar words in the line of bill of lading cases, culminating in *Gosse Millerd, Ld.* v. *Canadian Government Merchant Marine* (1) should not be followed. Even if the narrower meaning laid down in those cases cannot be disregarded, on the facts of this case, the negligence was in the management of the ship and not of the cargo: see *The Glenochil* (2), *The Rodney* (3). The *Gosse Millerd* case (1) was decided by the House of Lords in the way it was because the wider construction of the words adopted by the Court of Appeal would have nullified the statutory duty imposed on the shipowners under the Harter Act to take care of the cargo.

The Attorney-General (*Sir David Maxwell Fyfe K.C.*), *Owen Bateson K.C.*, and *Peter Bucknill* for the defendants, the Admiralty, the Government of Nigeria and others. The damage was occasioned through negligence in the management of the cargo. The manipulation of the cargo lines for pumping ashore the contents of the tank necessitated an opening to let out the petrol, and the opening of the sea valves at Takoradi was for the purpose of cleaning the pipe lines. These operations had nothing to do with the management of the ship, any more than negligent stowage: *The Ferro* (4); neglect to prevent pilfering (*Hourani* v. *T. & J. Harrison* (5)); or defective refrigerating apparatus (*Rowson* v. *Atlantic Transport Co.* (6); *Foreman and Ellams* v. *Federal Steam Navigation Co.* (7). Limitation of liability is a benefit conferred on the shipowner by statute, and its terms should be construed as strictly as in the Carriage of Goods by Sea Act or the Harter Act, see the *Gosse Millerd* case (1) and the line of authorities there reviewed. As to what does not constitute an act of "navigation" see *The Alde* (8). [Reference was also made to *The Vigilant* (9); *The Torbryan* (10); *Cattermole* v. *Atlantic Transport Co.* (11); *The Ruapehu* (12); *Dobell & Co.* v. *S.S.*

(1) [1929] A. C. 223.
(2) [1896] P. 10.
(3) [1900] P. 112.
(4) [1893] P. 38.
(5) (1927) 32 Com. Cas. 305.
(6) [1903] 2 K. B. 666.
(7) [1928] 2 K. B. 424.
(8) [1926] P. 211.
(9) [1921] P. 312.
(10) [1903] P. 35.
(11) [1902] 1 K. B. 204.
(12) [1927] A. C. 523.

1945

THE ATHELVICTOR.

Rossmore Co. (1); *The Millie* (2); and *William Cory & Son* v. *Dorman Long & Co.* (3).

Porges for the defendants, Elder Dempster Lines, Ld., adopted the same arguments.

Sellers K.C. replied.

Cur. adv. vult.

July 27. PILCHER J. read a judgment in which, after stating the facts, he continued: The escape of petrol and the resulting fire, explosion and damage, loss of life and personal injury having admittedly been caused by the negligence of the ship's personnel, the plaintiffs are only entitled to limit their liability for the damage so occasioned if they can establish that such damage is covered by the words of s. 503 (1.) (*d*) of the Merchant Shipping Act, 1894, as extended by s. 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, i.e., if the damage, loss of life and personal injury was caused "by reason of the improper navigation or management of "the ship." No right to limit his liability is conferred on a shipowner by the Merchant Shipping Act in respect of claims for loss of life or personal injuries sustained by persons ashore, and he is only entitled by s. 503 (1.) (*c*) of the Act of 1894 to limit his liability in respect of loss of life and personal injury claims by persons on board other vessels when the claim arises out of the improper navigation of the ship, as opposed to its improper management. This was conceded by the plaintiffs at the hearing to be the effect of the relevant section of the Merchant Shipping Act, and it follows that the plaintiffs are not in any event entitled to limit their liability in respect of claims by or on behalf of any persons who lost their lives or sustained personal injuries ashore.

Mr. Sellers argued that the negligence by the ship's personnel constituted either improper navigation or improper management of the *Athelvictor*. The courts of this country have during the last fifty years or so frequently been called upon, when construing very similar words occurring in bills of lading, to consider whether a particular act of negligence was an act of navigation of the ship or of management of the ship. The earliest of these cases which it is necessary to mention was *The Ferro* (4), and the latest *Gosse Millerd, Ld.* v. *Canadian Govern-*

(1) [1895] 2 Q. B. 408.
(2) [1940] P. 1
(3) (1936) 55 Ll. L. Rep. 1.
(4) [1893] P. 38.

ment Merchant Marine (1). Mr. Sellers contended that this line of cases which deal with the contractual relationship of goods-owner and shipowner, more particularly when such relationship is governed by statutory enactments, e.g., the American Harter Act or the Carriage of Goods by Sea Act, afforded little if any guidance in the present case and he asked me to disregard this line of cases altogether. He submitted that the words "improper navigation or management of the ship" should be given their ordinary and natural meaning and not the somewhat artificial meaning accorded to similar words where such words appear in exception clauses in documents evidencing a contract of carriage. He submitted that the words under consideration, if given their natural meaning, were wide enough to cover and should cover the mismanagement of any physical part of the ship or any ship's fitment or appliance, even if such fitment or appliance was primarily or solely designed to deal with or ensure the safe loading, carriage or discharge of the cargo. In support of his argument Mr. Sellers referred me to *The Warkworth* (2), a limitation case decided under the Merchant Shipping Act, 1862, and also to certain insurance cases between members of mutual protection and indemnity associations and their associations: *Good* v. *London Steamship Owners' Mutual Protecting Association* (3); *Carmichael & Co.* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association* (4); *Canada Shipping Co.* v. *British Shipowners Mutual Protection Association* (5). In all these cases the issue was whether on a proper construction of the deed or policy of insurance certain acts of negligence by the shipowner's servants constituted negligence in the navigation of the ship. It is perhaps unnecessary for me to say more about these cases than that in *The Warkworth* (2), and also in the club cases, a very wide construction was put on the words "navigation of the ship," and acts of negligence by the ship's servants were held to be neglects in navigation which might at the present time be regarded as more conveniently covered by the word "management." In the last resort Mr. Sellers contended that even if it was not proper to disregard the principles laid down for the construction of similarly worded clauses in bills of lading, on the facts of the present case he was entitled to succeed in his contention that the negligent release

(1) [1929] A. C. 223.
(2) 9 P. D. 20, 145.
(3) L. R. 6 C. P. 563.
(4) 19 Q. B. D. 242.
(5) 23 Q. B. D. 342.

1945

THE ATHELVICTOR.

Pilcher J.

of the petrol from the *Athelvictor* constituted improper management of the ship. Relying principally on *The Warkworth* (1) and the insurance cases referred to above, Mr. Sellers submitted that the negligence of the personnel on board the *Athelvictor* was negligence in the navigation of the vessel.

The legislature has granted to the shipowner the right to limit in respect of certain damage where the neglect causing the damage is a neglect in navigation, and a right to limit in respect of wider classes of damage where the neglect causing the damage is a neglect in management of the ship. The two words " navigation " and " management " are thus in antithesis in the sections which I have to consider, and, whether or not the neglect which caused the damage in this case was a neglect in management, I am quite clear that it would be placing a strained interpretation on the word " navigation " to hold that it was a neglect in navigation. I do not consider myself bound by the club cases to which I have referred, as in those cases the court was construing what amounted to a policy of insurance. In *The Warkworth* (1) the court was not called on to consider whether the neglect which occurred was a neglect in management, and in that case the damage occurred while the vessel was being navigated. When the damage in question in the present case occurred the *Athelvictor* was lying moored alongside the jetty. The appliance which was negligently mishandled had nothing to do with the navigation of the ship, and I am satisfied that to hold that the negligent failure of the ship's personnel to close the three valves which had been allowed to remain open cannot possibly be regarded as improper navigation of the ship. It follows, therefore, that the plaintiffs are not entitled to limit their liability in respect of claims for loss of life or personal injury by persons who were at the material time on board any other vessel.

Mr. Sellers' principal argument was directed to the proper construction of the words " improper management of the " ship," and I will now consider this point. In doing so it is perhaps permissible to observe that, while the general rule that a shipowner is entitled to limit his liability in respect of collision damage has been recognized from early days by most of the important maritime nations of the world, such right did not apparently exist by the common law of this country. From the middle of the eighteenth century, however, various

(1) 9 P. D. 20, 145.

1945

THE ATHEL-VICTOR.

Pilcher J.

statutory enactments have provided that a shipowner shall be entitled to limit his liability in respect of certain matters. Originally the owner of a British ship was by statute granted the right to limit his liability to the value of the ship and freight earned. The limitation fund was later quantified pecuniarily by reference to the registered tonnage of the vessel. Until the passing of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, the scheme of the various Merchant Shipping Acts culminating in the Merchant Shipping Act, 1894, seems to have been, broadly speaking, as follows: A shipowner was, in the absence of fault or privity, entitled to complete exemption from liability (i.) in respect of loss of goods on board his ship due to fire, and (ii.) in respect of loss of gold and precious articles on board his ship, the true value and nature of which was not declared on shipment by the shipper. In addition to the above matters in respect of which the shipowner was entitled to complete immunity, he was, in the absence of fault or privity, also entitled to limit his liability in respect of (i.) loss of life or personal injury to any person on board his ship, however caused; (ii.) damage to cargo on board his ship, however caused; (iii.) loss of life or personal injury to those on board any other ship when caused by the improper navigation of his own ship; and (iv.) damage to other ships and their cargoes caused by the improper navigation of his own ship. It will thus be seen that in dealing with limitation of liability the legislature has never concerned itself with the contractual obligations of shipowner and cargo-owner and has always recognized the shipowner's right to complete exemption, or else to limitation of liability, in respect of all types of negligence of his own servants in the carriage and care of cargo on board his ship. Until the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, the shipowner could, however, only limit his liability in respect of damage to other ships and their cargo and in respect of claims for loss of life and personal injuries to persons on board other ships when the damage was occasioned by the negligence of his servants in the navigation of his own ship.

Section 1 of the Act of 1900 provides as follows: "The "limitation of the liability of the owners of any ship set by "s. 503 of the Merchant Shipping Act, 1894, in respect of loss "of or damage to vessels, goods, merchandise or other things, "shall extend and apply to all cases where (without their "actual fault or privity) any loss or damage is caused to

BIBL. Le[illegible] UNIV.

1945

THE ATHEL-VICTOR.

Pilcher J.

" property or rights of any kind, whether on land or on water, " or whether fixed or movable, by reason of the improper " navigation or management of the ship." Section 2 of the same Act confers on dock and harbour authorities the right to limit their liability in respect of damage to vessels and cargo within their undertaking due to the negligence of the servants of the dock or harbour authority. It will be seen that s. 1 of this Act permits for the first time a shipowner to limit his liability for damage done to property ashore and also extends the type of negligent act in respect of which he is entitled to limit under both Acts in respect of damage to other ships and their cargo and property ashore to cases in which the ship is improperly managed, in addition to cases where the ship is improperly navigated. It is perhaps permissible to assume that ss. 1 and 2 are not completely unrelated and that they represent an accommodation between shipowners and dock-owners, sanctioned by Parliament, under which the shipowner was granted the right to limit for damage done ashore, whether by improper navigation or by improper management of his ship, and the dock-owner was permitted for the first time to limit his liability to a substantial but arbitrary figure if, through the negligence of his servants, damage was occasioned to vessels in his undertaking.

I have set out in summary fashion the broad effect of the statutory enactments governing the limitation of shipowners' liability, in order to see whether any guidance can be derived from a study of these enactments as to the proper construction to be given to the words " improper management of the ship " in the Act of 1900. Appearing, as these words do for the first time, in a limitation statute which confers extended rights of limitation on shipowners and new rights of limitation on harbour and dock authorities, it seems reasonably clear that the words " improper management of the ship " were intended to cover acts of negligence by the shipowner's servants, other than acts of improper navigation, which might do damage to property ashore. The type of negligence by a shipowner's servant which would be most likely to do damage ashore of a sufficiently serious character to bring limitation into play would seem to be negligence which resulted in a fire or an explosion. Negligence of this type might be negligence by the shipowner's servants in the management of the ship's furnaces and boilers or negligence in the handling of inflammable or explosive cargo. It is difficult indeed to see how damage to

property ashore caused other than by negligent navigation could be of a sufficiently serious character to bring limitation into play unless due to fire or explosion. I therefore conclude that this was the type of damage envisaged by the legislature when it extended the shipowner's right to limit his liability for damage done to other ships and cargo and property ashore to acts of improper management of the ship as opposed to acts of improper navigation. It is clear, moreover, that damage to property and other ships in the vicinity is just as likely (if not more likely) to be caused by the negligent management of dangerous cargo as by the negligent management of some ship's appliance unconnected with cargo or of any ship's appliance in a ship not carrying cargo. With the above-mentioned matters in mind, but without attaching any undue importance to them, I approach the question: What is the meaning to be attached to the words "improper management of the ship" in this limitation statute? The business of a shipowner is to carry cargo and passengers and in the very broadest sense the management of a ship must include the management of the cargo or passenger-carrying venture. Taking the words again in their very broadest and popular sense, the management of a ship by her master and officers must include many duties quite unconnected with navigation, but which none the less go to ensure the safety of the cargo or the well-being of the passengers. I am well aware that a narrower interpretation has been placed on similar words in the bill of lading cases, and I will refer to those cases presently. If, however, it be permissible or proper to disregard the construction put on similar words in those cases, my view is that the words "improper management of "the ship" in s. 1 of the Act of 1900 are wide enough to cover, and should be held to cover, the negligence of which the plaintiffs' servants on board the *Athelvictor* were guilty.

As this case may well be reviewed by a higher court, it will perhaps be convenient to indicate in more detail the purposes served by the three valves which were mismanaged on board the *Athelvictor*. They were all used for the admission of sea water into the appropriate tanks when this was necessary for allasting the vessel. They were sometimes used for de-ballasting, although this operation was more usually conducted through other pipes and valves. Both of these operations were essentially ship's operations and were quite unconnected with cargo. The three valves were, however, used to admit sea water into any cargo pipeline which required cleaning. This was

1945

THE ATHEL-VICTOR.

Pilcher J.

essentially an operation conducted in the sole interest of the cargo. Sea water was sometimes admitted through these three valves to the port pump in order to pump the last remains of liquid cargo along the receiver's shore lines. This operation was not a usual one and was only performed if the receivers requested it. It was, however, essentially a cargo operation, which did, when it was carried out, involve the manipulation of the three valves which I have mentioned. The real negligence in this case consisted, in my view, in the failure of the ship's personnel to close these three valves. They should have closed them after the valves had been used for a cargo purpose, namely, admitting sea water at Takoradi for the cleaning of the cargo pipelines. No damage occurred on the passage from Takoradi while the ship was being navigated to Lagos, although the three valves remained opened, and no damage occurred at Lagos until No. 2 centre tank pipeline was "set" by opening the appropriate valves. The opening of these valves was done for a cargo purpose and it was the opening of these valves which started the release of petrol from the ship. None the less, I am satisfied that the real negligence of the shipowner's servants was not the "setting" of the cargo pipeline by the opening of the appropriate valves but their continuing negligence at all times after the pipe-cleaning operation had been completed at Takoradi in failing to shut the sea valves. I think, moreover, that the negligence of the ship's personnel in relation to these valves was a type of negligence which is covered by the words "improper management of the ship," giving to these words their ordinary meaning and disregarding for the moment the more limited interpretation which has been given to similar words in the bill of lading cases.

It remains to be considered whether the narrower meaning which undoubtedly has been adopted by the courts in construing similar words to "improper management of the "ship," when such words appear in contractual or statutory exception clauses in contracts for the carriage of goods by sea, compel me to restrict what appears to me to be the ordinary meaning of the words in question and to give to them a narrower interpretation. The first case to which I will refer is *The Ferro* (1). That case decided that a shipowner was not protected by the words of exception "damage from any act, "neglect or default of the pilot, master or mariners in the "management of the ship." The facts were that certain

(1) [1893] P. 38.

oranges were damaged owing to the fact that they had been negligently stowed by stevedores. The court found that the stevedores, whose negligence caused the damage, were not included in the list of persons in respect of whose negligence the shipowner was by the term of the exception clause relieved from liability and also found that the words " neglect in the " management of the ship " did not include negligent stowage. In the year 1895 *The Glenochil* (1) was decided by Jeune P. and Gorell Barnes J. This was a claim on a bill of lading which incorporated all the terms and provisions of the Harter Act, and the decision of the Divisional Court is an important one because it has been referred to with approval in almost every subsequent case in which the courts of this country have had to consider the meaning of the words " management of the " ship " in a contract of affreightment. The facts were that cargo was damaged by sea water during discharge while the water was being pumped into the vessel's ballast tanks to stiffen her. The sea water escaped into the cargo space through a crack or hole in a broken sounding pipe. The ship's engineers were held to have been guilty of negligence in failing to ascertain that the sounding pipe in question was in good condition before pumping up the ship's ballast tanks. Both the learned judges approached the problem of construing the words of exception in s. 3 of the Harter Act " faults or errors in " the . . . . management of the ship " by a careful consideration of the whole framework of the Act, the provisions of which governed the contract of carriage between the parties. In the course of his judgment the President says : " It is not, " at first sight, easy to understand the meaning of the Harter " Act, and to reconcile s. 1 and s. 3 ; but I think the correct " explanation has been given to us by the learned counsel who " appear for the respondents. No doubt the object of s. 1 is " in terms to prevent clauses being inserted in mercantile " instruments which would exempt the carrier from want of " proper care in regard to the cargo. It is obvious that those " words cannot be taken in their largest sense, because in a " secondary, though not primary sense, any mismanagement " of the ship, in navigation or otherwise, is want of proper care " as regards the cargo. But it is clear that it was intended " by s. 3 to exempt from liability for damage or loss resulting " from faults and errors of navigation or in the management of " the vessel ; and the way in which those two provisions may

(1) [1896] P. 10, 14, 16, 18.

1945

THE ATHELVICTOR.

Pilcher J.

" be reconciled is, I think, first that the Act prevents exemptions " in the case of direct want of care in respect of the cargo, " and secondly, the exemption permitted is in respect of a fault " primarily connected with the navigation or the management " of the vessel and not with the cargo." Later he says : " This " court had before it the same sort of question in the case of *The* " *Ferro* (1), and I adhere to what I said then, that mere stowage " is an altogether different matter from the management of the " vessel. It may be that the illustration I gave in that case, as to " the removal of the hatches for the sake of ventilation, was not " a very happy one ; but the distinction I intended to draw then, " and intend to draw now, is one between want of care of cargo " and want of care of vessel indirectly affecting the cargo." Gorell Barnes J. says (2) : " In the course of the argument two " principal points seem to me to have been taken. It is said " that the word ' management,' having regard to the other " sections of the Act, cannot mean management of the vessel " which may affect the cargo by letting water into the ship. " But I think if those sections are looked at there will be found " a strong and marked contrast in the provisions which deal " with the care of the cargo and those which deal with the " management of the ship herself ; and I think that where the " act done in the management of the ship is one which is " necessarily done in the proper handling of the vessel, though " in the particular case the handling is not properly done, but is " done for the safety of the ship herself, and is not primarily " done at all in connexion with the cargo, that must be a matter " which falls within the words ' management of the said " ' vessel '." It will thus be seen that both the learned judges responsible for this decision, in considering whether the act of negligence with which they were concerned was a fault or error in the management of the ship, had to attach a meaning to those words which would not conflict with the shipowner's primary obligation under the Harter Act to take proper care of the cargo. In the result they decided that the particular negligence which had occurred was a fault or error in the management of the ship.

The Rodney (3) was another case in which the Harter Act was incorporated by a clause paramount. It was tried by the same two judges who were responsible for the decision in *The Glenochil* (4). No new principle was enunciated and at the

(1) [1893] P. 38.
(2) [1896] P. 10, 18.
(3) [1900] P. 112.
(4) [1896] P. 10.

conclusion of his judgment Gorell Barnes J. said: "I think "that the words 'faults or errors in the management of the "'vessel' include improper handling of the ship, as a ship, "which affects the safety of the cargo." *Rowson* v. *Atlantic Transport Co.* (1), was another Harter Act case which depended very much on its own facts. The members of the Court of Appeal responsible for the decision had before them *The Glenochil* (2) and *The Rodney* (3), and recognized that the proper interpretation of the words "act neglect or default in the "management of the vessel" must be conditioned by the fact that these words were within the framework of a foreign Act incorporated into the contract of carriage, and that this Act placed certain primary obligations on the shipowner to care for the cargo entrusted to him.

The next case to which it is necessary to make reference is *Hourani* v. *T. and J. Harrison* (4). This was a case under the Carriage of Goods by Sea Act, 1924. The schedule to this Act provides by art. III., r. 2, that "Subject to the provisions of "art. IV. the carriers shall properly and carefully load, handle, "stow, carry, keep, care for and discharge the goods carried." Article IV., r. 2, provides that "Neither the carrier nor the ship "shall be responsible for loss or damage arising or resulting "from (*a*) act, neglect or default of the servants of the carrier "in the navigation or in the management of the ship." In *Hourani's* case (4), stevedores at Mexican ports looted and pilfered cargo during discharge, and one of the questions for decision was whether such act was a neglect by the shipowner's servants in the management of the ship. The Court of Appeal decided that it was not, and Atkin L.J., after considering the cases to which I have already referred, said: "At the present "day a part of the proper equipment of cargo-carrying ships is "very largely concerned with appliances for the safe carrying "of the cargo, appliances that have nothing to do with the "navigation of the ship but have everything to do with the "safety of the cargo, and amongst other things one would "mention in particular the refrigerating machinery, which was "the subject of the discussion in *Rowson's* case (1), and other "matters dealing with ventilation, fans, pumps—there may be "a great many pumps on board a ship the sole object of which "is to deal with the cargo, the pumps of an oil tanker for "instance—and winches and derricks and so forth, which have "nothing to do with the navigation of the ship, but which

(1) [1903] 2 K. B. 666.
(2) [1896] P. 10.
(3) [1900] P. 112.
(4) 32 Com. Cas. 305, 320.

1945

THE ATHEL-VICTOR.

Pilcher J.

" are still part of the structure of the ship and without which the " ship would clearly not be seaworthy either if they were not " fitted at all or if they were not in a proper condition when " the ship started sailing. For my part, at the present moment " I have a difficulty in seeing, if there was a defect in the " management of those appliances in the ship which are an " essential part of the ship, that that would not be a defect in " the management of the ship." The question whether a particular act or neglect constituted a neglect in the care of the cargo, or was a neglect or default in respect of which a shipowner was entitled to escape liability under art. IV., r. 2 (*a*), of the Carriage of Goods by Sea Act, was finally considered by the House of Lords in *Gosse Millerd, Ld.* v. *Canadian Government Merchant Marine* (1). In that case, which was tried by Wright J., in the commercial court, a quantity of tinplates in the vessel's hold were damaged by fresh water owing to the hatches and tarpaulins being left off the hold while the vessel was in port undergoing repairs with the goods on board. Wright J. held that the negligence of the shipowner's servants in reference to the hatches and tarpaulins was not a neglect in the management of the ship but a failure properly to care for the cargo. He concludes his judgment (2) by saying, " I think " that in the present case the protection of the tinplate cargo " fell under art. III., r. 2, and not under art. IV., r. 2 (*a*). " Any other view would in effect nullify the former provision." These words, and indeed the whole judgment, show that in construing the meaning to be given to the words " neglect in the " management of the ship " the learned judge inevitably felt the necessity of striking a proper balance between the shipowner's obligations to care for his cargo under art. III. and his immunities under art. IV., r. 2.

The decision of Wright J. was reversed in the Court of Appeal by Scrutton and Sargant L.JJ., Greer L.J. dissenting (3). Scrutton L.J., after discussing the position of shipowner and cargo-owner under the Carriage of Goods by Sea Act, says : " The question, therefore, is whether the facts found by the " judge amount to ' neglect or default of the servants of the " ' carrier in the management of the ship.' Unassisted by " authorities I should have felt no doubt that they did. " Assuming that the words deal with the management of the " ship as a physical entity, and not management of the cargo-

(1) [1929] A. C. 223.
(2) [1927] 2 K. B. 432, 435.
(3) [1928] 1 K. B. 717, 724.

1945

THE ATHELVICTOR.

Pilcher J.

" carrying adventure on which the shipowner and cargo-owner have agreed to use the ship, here what has been managed is the hatches of No. 5 hold, an essential physical part of the ship. For the purpose of repairing damage to the ship in order that she may resume her voyage, those hatches have been physically dealt with and dealt with so negligently that during their absence in rainy weather such quantities of rain have entered the hold as to damage the cargo in the hold. I cannot understand why, on the words themselves, without reference to any authorities, this is not negligence in the management of the ship, or a substantial physical part of the ship. The words to be construed occur in a statutory contract between shipowner and cargo-owner relating to the carriage of goods in a ship. The cargo-owner has no interest in an empty ship or its management. The shipowner undertakes to use due diligence to provide a ship fit for the carriage of goods, including proper propelling and pumping machinery and, where the cargo requires it, proper refrigerating and ventilating appliances, and in such a proper ship properly to carry and deliver a cargo, and he exempts himself from liability for negligent management of such a ship by his servants. Why it should be an objection to management of part of the ship coming within the exception that it is being primarily managed for the benefit of the cargo, I do not understand. That is what the ship is to be used for. It is ' navigated ' to direct the ship and so carry the cargo safely to its proper destination. It is as a physical entity ' managed ' for the same purpose. Some of the management may not preserve the physical ship, but it is still carried out to preserve the cargo. I cannot see any difference between negligently leaving partly open a port or seacock, whereby water enters which is no danger to the ship, but damages the cargo, negligently managing the pumping apparatus with the same result, or negligently leaving the hatches off, whether to repair the ship or ventilate the cargo, whereby salt water at sea, or fresh water in rainy weather in port, enters the hold and damages the cargo. Negligent management of the propelling machinery, which is hardly ' navigation,' and negligent management of the refrigerating or ventilating or pumping machinery, seem all to be equally management of the ship. Most modern steamers have masts with no yards, but derricks for loading and unloading cargo attached to them. I do not understand why the derricks are not part of the ship."

1945

THE ATHELVICTOR.

Pilcher J.

I have quoted the above passage at length because, although the decision of the Court of Appeal was reversed in the House of Lords, it is significant that a judge of the wide learning and experience of Scrutton L.J. should have taken the view that the words " neglect in the management of the ship," which I take to be the same as " improper management of the ship," were wide enough to cover any mishandling of a physical part of the ship or her appliances. The learned lord justice seems to have had no doubt that this was the ordinary and natural meaning of the words, even when occurring in an Act of Parliament some of the other provisions of which seem to indicate that a narrower construction may have been intended by Parliament.

The *Gosse Millerd* case was taken to the House of Lords (1). Lord Hailsham, in whose judgment Lord Atkin concurred, after quoting passages from the judgment in *The Glenochil* (2), which I have already set out, says: " My Lords, in my " judgment the principle laid down in *The Glenochil* (2) and " accepted by the Supreme Court of the United States in cases " arising under the American Harter Act, and affirmed and " applied by the Court of Appeal in the *Hourani* case (3) " under the present English statute, is the correct one to apply. " Necessarily, there may be cases on the border-line, depending " upon their own particular facts ; but if the principle is clearly " borne in mind of distinguishing between want of care of cargo " and want of care of vessel indirectly affecting the cargo, as " Sir Francis Jeune puts it, there ought not to be very great " difficulty in arriving at a proper conclusion." Lord Sumner says, referring to the Carriage of Goods by Sea Act, 1924: " The intention of this legislation in dealing with the liability " of a shipowner as a carrier of goods by sea undoubtedly was " to replace a conventional contract, in which it was constantly " attempted, often with much success, to relieve the carrier " from every kind of liability, by a legislative bargain, under " which he should be permitted to limit his obligation to take " good care of the cargo by an exception, among others, " relating to navigation and management of the ship. Obviously " his position was to be one of restricted exemption. " If management of the ship includes any part of the ship or " any operation with regard to the ship as a whole, which is " carried out for ship's purposes and not merely in relation to " cargo, I think that the shipowner's position would be certainly

(1) [1929] A. C. 223, 233, 236.
(2) [1896] P. 10.
(3) 32 Com. Cas. 305.

" no less favourable than it was before under voluntary bills " of lading and probably more so ; for on this construction the " obligation of art. III., r. 2, to take care of the " cargo is practically eviscerated and its business efficacy is " frustrated. In every set of circumstances, of common " occurrence at any rate, the shipowner would be relieved. " Considering the provisions of the Act of 1924 and the circum- " stances in which it was passed, such an interpretation is " admissible only if the words used are clear to that effect, " and to my mind they are not." From the above passage it is clear that Lord Sumner's construction of the words in question are completely conditioned by their place in the general structure of the Act in which they occur. It is reasonably clear that one of the reasons, if not the chief reason, which led him to reject the wider interpretation of the words " management " of the ship," favoured by Scrutton L.J., was that such a construction would for practical purposes nullify the obligation imposed on the shipowner and his servants under art. III., r. 2, carefully to look after the cargo entrusted to them.

The last case to which I need refer is *Foreman and Ellams, Ld.* v. *Federal Steam Navigation Co.* (1). This was another case tried by Wright J., in which refrigerated cargo had been damaged owing to the negligence of the ship's engineers in the handling of the vessel's refrigerating machinery. The bill of lading was subject to the Sea Carriage of Goods Act of Australia, 1924, the schedule to which is in terms identical with the schedule to the Carriage of Goods by Sea Act, 1924. Wright J. says : " It is apparent that if ' management of the ship ' here " includes management of the refrigerating machinery resulting " in improper temperatures in the hold to the detriment of the " cargo, there is in effect nothing left of the obligation properly " to care for such a cargo under art. III., r. 2. On that view " in effect the exception is a general negligence exception, but " in the absence of very clear words where words of positive " obligation are subject to words of exception, the presumption " is that the exception is narrower than the obligation." [His Lordship quoted further passages from the judgment of Wright J. and continued :]

I make no apology for these long quotations from the judgment of Wright J., because the passages which I have quoted show how the learned judge's view of the proper construction to be given to the words under consideration was

(1) [1928] 2 K. B. 424, 437, 439.

1945

THE ATHELVICTOR.

Pilcher J.

based on the necessity of giving to the words a meaning which would fit into the framework of the Carriage of Goods by Sea Act and ensure that the shipowner under modern conditions of sea carriage did not escape from the obligation imposed on him and his servants by the Act to take proper care of the cargo entrusted to him.

To summarize the matter, I am satisfied that, removed from the framework of an Act governing the mutual obligations, rights and immunities of shipowner and cargo-owner, such as the Harter Act or the Carriage of Goods by Sea Act, the ordinary and natural meaning of the words " improper management of " the ship " cover improper management of the appliances of the ship at any rate where, as in this case, such appliances are fitted both for ship's purposes and for cargo purposes. I am satisfied by a careful examination of all the bill of lading cases that the narrower construction placed on these words in such cases was so placed because such construction was the only one which enabled proper effect to be given to the shipowner's obligation under the overriding Act to take care of the cargo entrusted to him. I am not fettered by any such limiting considerations in construing the words " improper management " of the ship " in the sections of the Merchant Shipping Acts with which I am concerned. None of these sections regulate the position as between shipowner and cargo-owner or in any way govern their relationship. My own view is that, occurring in the context in which they do, the words have a wider meaning than has been given to them in the bill of lading cases. If it were necessary or desirable that I should lay down any principle for their construction I should, with respect, adopt the principle favoured by Scrutton L.J. in the *Gosse Millerd* case (1). It is however sufficient for the decision of this case to say that I am satisfied that the words in question, giving to them their ordinary and natural meaning, cover the negligence of the ship's personnel of the *Athelvictor* which led to the release from the vessel of the petrol which did the damage. I accordingly find that the plaintiffs are entitled to limit their liability in respect of the damage done to other vessels and to property ashore, but not in respect of claims for loss of life or personal injury occurring either on other vessels or ashore. This finding disposes of the case. I need hardly say that I have only arrived at a conclusion giving to the words " improper " management of the ship " in this case a wider meaning than

(1) [1928] 1 K. B. 717.

1945

THE ATHEL-VICTOR.

Pilcher J.

was given to almost exactly similar words in the bill of lading cases after very careful thought. If this had been an action by the owners of the petrol which was lost against the shipowner under a bill of lading covered by the Carriage of Goods by Sea Act, or the Harter Act, I should have had very little doubt that, on the principles laid down in *The Glenochil* (1) and the *Gosse Millerd* case (2), the correct conclusion on the facts would have been that the loss of the petrol was due to a failure of the shipowner, through his servants, to take care of the petrol and not to an act of negligence by the shipowner's servants in the management of the ship. I only add this because the case may go higher and it may be decided that the distinction which I have drawn between the meaning to be given to the relevant words of the Merchant Shipping Act and the similar words in the Acts governing contracts of affreightment is unjustified.

Solicitors for plaintiffs : *Hill, Dickinson & Co.*

Solicitors for defendants : *Treasury Solicitor ;* and (for Elder Dempster Lines, Ld.) *Lawrence Jones & Co.*

(1) [1896] P. 10. (2) [1929] A. C. 223.

E. C. M. T.

WOLFENDEN *v.* WOLFENDEN.

1945

June 6 ; July 27.

Lord Merriman P.

Divorce—Nullity—Common law marriage in China.

The parties went through a ceremony of marriage at a Scottish Mission Church in China. There was no prior notice of the intended marriage, no licence was procured, no banns were published, and the minister was not a person authorized to perform a marriage under the Foreign Marriage Act, 1892. A question arising whether this was a valid common law marriage, notwithstanding the absence of an episcopally ordained priest :—

Held, that though English law was administered in the district by Order in Council the whole of the English law did not necessarily apply, and the principle laid down in *Maclean* v. *Cristall* (1849), 7 Notes of Cases, Supp. p. 17, that a British subject takes to a colony only so much English law as is applicable to his situation, equally applies to a district where the Foreign Marriage Act, 1892, applies, and British citizens have extra-territorial rights. There being no obligation in the district in question, so far as English law was

1945

WOLFENDEN v. WOLFENDEN.

concerned, that the ceremony should be performed by an episcopally ordained priest, it was a valid common law marriage.

Reg. v. *Millis* (1844) 10 Cl. & Fin. 534, distinguished; *Catterall* v. *Catterall* (1847) 1 Rob. Eccl. 580 and *Maclean* v. *Cristall* (1849) 7 Notes of Cases, Supp., pp. 17, 24, followed.

PETITION for declaration of nullity of marriage on the ground that there had been no valid marriage, or alternatively for divorce on the ground of the respondent's desertion.

The parties went through a ceremony of marriage in October, 1938, at the Burgess Church of the Church of Scotland Mission in the District of Ichang in the Province of Hupeh, China, it being performed by the minister of the mission who was neither episcopally ordained nor a person authorized to perform a marriage under the Foreign Marriage Act, 1892. None of the usual formalities were complied with, and at the time of the ceremony both parties intended to have it confirmed at a later date by a civil marriage before a proper Consular Officer, which they both had been informed, and thought, was necessary in order to effect a valid marriage. Within a few weeks the wife said she would not bind herself by a civil ceremony, although the petitioner repeatedly requested her to do so, and shortly afterwards she returned to her home in Canada. The parties never lived together again. Correspondence between the parties was put in by the husband in support of his petition and the wife also was called as a witness.

On June 6, the case was referred by the President to the King's Proctor for argument as to the validity of the marriage.

Colin Duncan for petitioner.

Holroyd Pearce K.C. and *Comyn* for the King's Proctor.

Cur. adv. vult.

July 27. LORD MERRIMAN P., having stated the facts, continued: The question is whether or not this ceremony, although the parties undoubtedly thought it was not fully effective, did effect a valid marriage. That it did not conform with the Foreign Marriage Act is made quite clear—indeed there is no dispute about it—by a Foreign Office Certificate dated June 4, 1945, under the hand of the late Prime Minister and under the seal of the Foreign Office duly put in before me. It was suggested that I might have to consider whether the

marriage conformed to the law of the place where it was celebrated. I have no evidence at all of Chinese law and I am bound to say, having considered the matter, I do not think I could possibly hold that in the circumstances of this case that law was applicable. I do not propose to examine that proposition further. The real question on the supposition that the local law had nothing to do with it, and the marriage admittedly not being validated by the Foreign Marriage Act, is whether it is valid as a common law marriage, although it was not performed by an episcopally ordained priest.

In *Reg.* v. *Millis* (1), it was decided, that so far as England and Ireland are concerned it is the law that a common law marriage can only be validly celebrated before an episcopally ordained priest. It is not in the least to the purpose to point out that that result was arrived at in a somewhat curious way. It arose out of a trial for bigamy, inasmuch as the accused had gone through the form of a second marriage after an earlier ceremony performed according to the rites of the Presbyterian Church. He could not, of course, be convicted of bigamy unless the first ceremony was valid. The court in Ireland was equally divided two against two, but in order to raise the question one of the judges withdrew his opinion. The matter came up to the House of Lords and there again six Law Lords were equally divided, the result being that the appellant failed and it was held that the original marriage performed according to the rites of the Presbyterian Church was invalid. Nevertheless it must be taken that that is the law as regards England and Ireland.

The question in this case is whether, in order to effect a valid common law marriage in the District of Ichang, in the Province of Hupeh, in China, in the year 1938, it was or was not necessary that the ceremony should be performed by an episcopally ordained priest. If the decision in *Reg.* v. *Millis* (1) had never been qualified it manifestly would compel me to decide in the same sense, but that is not the position. In 1847, Dr. Lushington, in *Catterall* v. *Catterall* (2) held that a marriage in New South Wales before a Presbyterian Minister, where there was in fact consent between the parties to become husband and wife, was a valid marriage notwithstanding the fact that the ceremony did not comply with the provisions of a local Act. In that Act, however, there were no words which constituted the ceremony a nullity failing compliance with the Act.

(1) (1844) 10 Cl. & F. 534. (2) (1847) 1 Rob. Eccl. 580.

1945

WOLFENDEN v. WOLFENDEN.

Lord Merriman P.

Dr. Lushington held that there was a valid marriage on which he could base a decree. He so held not merely notwithstanding the terms of the Australian Act (which as he had held earlier did not of itself nullify any ceremony not performed in accordance with the Act) but also notwithstanding the decision in *Reg.* v. *Millis* (1). He held, in effect, that that case did not apply with full force to a marriage performed in New South Wales.

I need not examine *Catterall* v. *Catterall* (2) any further, because the matter was dealt with in what I regard as conclusive fashion by Sir Erskine Perry C.J., delivering the judgment of the full Court of the Supreme Court of Judicature of Bombay in *Maclean* v. *Cristall* (3) in 1849. In that case the matter arose because the husband was suing an adulterer in an action for criminal conversation. The marriage had been celebrated at Surat by a "Minister of the Gospel "and Missionary" who was not in Holy Orders but belonged to a sect called Congregationalists or Independents, and it was admitted that no person in Holy Orders was present at the ceremony. If, therefore, *Reg.* v. *Millis* (1) applied to a marriage in Surat it would be impossible for the action of criminal conversation to proceed. The matter was fully considered and the Chief Justice delivered a considered judgment in the course of which, after setting out the full effect of *Reg.* v. *Millis* (1), he discussed the question whether that judgment applied in India with all its full effect. In the course of so doing he said: "But the next step of the reasoning, as to the "extent to which the English law has been introduced into "India, is the point on which the judgment in the present case "must depend. The rule on this subject is afforded by the "doctrine of the common law with respect to colonies, which, "though not strictly analogous, is more in point than any of "the other rules in our law books. The rule in such case is, "that although colonists take the law of England with them "to their new home, they only take so much of it as is applicable "to their situation and condition. In many cases no question "will arise as to the inapplicability of several provisions of "English law, which are clearly seen to be merely municipal; "but whenever a question does spring up, it must be decided, "like other disputed points of law in the Law Courts of the "country. Blackstone lays down the rule very authoritatively "on this subject: 'What shall be admitted and what rejected,

(1) 10 Cl. & F. 534.
(2) 1 Rob. Eccl. 580.
(3) (1849) 7 Notes of Cases, Supplement 17, 24.

" ' at what times, and under what restrictions, must, in case of " ' dispute, be decided in the first instance by their (the " ' colonists') own provincial judicature, subject to the revision " ' and control of the King in Council '."

Not only in respect of that last quotation but in respect of the earlier proposition that though " colonists take the law of " England with them to their new home, they only take so " much of it as is applicable to their situation and condition," the learned Chief Justice was relying on the corresponding statement in Blackstone's Commentaries. He came to the same conclusion as Dr. Lushington, that in effect it was surely inconsistent with the theory on which the incorporation of British law into a colony was based that this particular requirement of the common law marriage should apply in India. It is not suggested that either of these two authorities has ever been questioned—as far as I know they have stood for the best part of one hundred years—and the question is whether they do, or do not, govern this case.

It was suggested that there was a distinction, inasmuch as we are here dealing with a place to which the Foreign Marriage Act applies, and a place in which, at the time in question, British citizens had extra-territorial rights. It is common ground in this case that the Chinese Order in Council of 1925 applied to the Province of Hupeh. The Order recites that " Whereas by " treaty, grant, usage, sufferance, and other lawful means, " His Majesty the King has jurisdiction within the Dominion " of the Republic of China His Majesty by virtue of and in " exercise of the powers in this behalf was pleased to pass an " Order in Council " setting out a system of judicature in that province, to the details of which it is unnecessary to refer. It was suggested, therefore, that that raised a different situation ; that in such a situation, at any rate, the principles available to the first entry of colonists into a new territory and the like could not apply, and if the theory is that this particular province (or any other place to which extra-territoriality applies) is British, then the whole law of England, without any exception, must apply also—in other words, that the decision in *Reg.* v. *Millis* (1) would apply with full force and effect. I do not think that that can be so for two reasons. First of all, I do not see any distinction in principle between applying in a colony, as New South Wales was at the time of Dr. Lushington's judgment, only so much of the English law as suited the situation (but applying it notwithstanding the fact that there was a local

(1) 10 Cl. & F. 534.

1945

WOLFENDEN v. WOLFENDEN.

Lord Merriman P.

Act of Parliament) and applying only so much of the English law as is suited to the situation of a British subject in this Province of Hupeh, notwithstanding that by Order in Council having the effect of legislation the courts of law are set up there to administer British justice. Unless there is something in either case which excludes anything but that which is laid down in the legislation it seems to me that precisely the same principles apply in the one case as in the other.

In fact, there is nothing in the legislation which is inconsistent with that view, for I find in s. 104 of the Chinese Order in Council this provision: "Subject to the provisions of this Order the "civil jurisdiction of every court acting under this Order shall, "as far as circumstances admit, be exercised on the principles "of and in conformity with English law for the time being in "force." That certainly cannot possibly be said to be exclusive. It seems to me that whether one puts it on this basis that one of the circumstances which must be taken into account is that the English law is being imported into a foreign country which in all material respects is indistinguishable from a colony, so far as access to priests of the Established Church and the like is concerned, or whether one puts it on the other basis, that when it is indicated that the jurisdiction of the court shall "be exercised on the principles of and in conformity with the "English law for the time being in force," the English law for the time being in force consists not only of the decision in *Reg.* v. *Millis* (1) but of the decision in *Reg.* v. *Millis* (1) as interpreted, as far as such a situation is concerned, by the decisions in *Catterall* v. *Catterall* (2) and *Maclean* v. *Cristall* (3), one comes to the same result. In such a territory as this there is, so far as the requirements of English law are concerned in relation to a common law marriage, no obligation that the ceremony shall be performed in the presence of an episcopally ordained priest.

In my opinion, therefore, so far as the first point is concerned, it seems to me that the petition on the ground of nullity must fail, and that it is my duty to say that this marriage was a valid marriage. [On the charge of desertion his Lordship granted a decree nisi.]

Solicitors: *Haslewood, Hare & Co.; the Official Solicitor.*

(1) 10 Cl. & F. 534.
(2) 1 Rob. Eccl. 580.
(3) (1849) 7 Notes of Cases, Supplement 17, 24.

V. J. M. S.

Dictum of BARNARD, J., at p. 69, *applied.* *R.* v. RAHMAN. [1949] 2 All E.R. 165.

1945

Feb. 22; *May* 17.

Barnard J.

SRINI VASAN (OTHERWISE CLAYTON) *v.* SRINI VASAN.

Nullity of marriage—Hindu marriage—Subsequent English marriage—Recognition of Hindu marriage.

The petitioner, an English woman, petitioned for nullity of marriage. At the time of the marriage, which took place in England, the respondent, who was a Hindu domiciled in India, but temporarily residing in this country, was already married in India to a Hindu woman according to Hindu law, and that marriage was still subsisting:—

Held, that a Hindu marriage, notwithstanding its potentially polygamous character, is recognized by the courts of this country and therefore the "marriage" of the petitioner and the respondent was null and void.

PETITION for nullity of marriage.

On December 26, 1936, the petitioner, who was then a spinster domiciled in England, went through a form of marriage with the respondent at the Blackburn registry office. The respondent was a Hindu domiciled in India but temporarily resident in this country. The parties lived together in England until June, 1937. The respondent then returned to India without the petitioner, and ceased to communicate with her after January, 1938. At the time of the English ceremony the respondent was already married, having in March, 1933, been through a Hindu ceremony of marriage with a Hindu woman unknown to the petitioner, at Trivandrum, Travancore State, South India, and the Hindu marriage was still subsisting.

Evidence was given as to Hindu law, and as to the validity of the Hindu marriage.

William Latey for petitioner. The petitioner is entitled to a decree of nullity. The Hindu marriage, although potentially polygamous, should be regarded in English law as valid. The text books lay down the principle that English law recognizes as a marriage only the voluntary union for life of one man with one woman to the exclusion of all others, but the authorities on which that principle is based were concerned with the unions of people reared in the Christian faith, or domiciled in this country, with others who were not so brought up or domiciled in circumstances that bore little, if any, relation to marriage as understood in Christendom: see *In re Bethell* (1). Hindu and Moslem marriages have often been held by the Judicial

(1) (1888) 38 Ch. D. 220.

1945

SRINI VASAN (OTHERWISE CLAYTON) v. SRINI VASAN

Committee of the Privy Council to be valid for the purposes of legitimacy, rights to property, and testamentary succession, and logically a Hindu marriage between Hindu and Hindu should also be recognized.

Cur. adv. vult.

May 17. BARNARD J., after stating the facts, continued: I am satisfied, by the evidence of Dr. Nissim, an expert on the law of British India, that the Hindu marriage was a valid marriage and would be recognized as such by the courts of British India, and that, both parties to it being Hindus, their marriage is regulated by Hindu Law. That law permits polygamy. The respondent's Hindu marriage was therefore a potentially polygamous marriage. The question which I have to decide is whether this Hindu marriage, notwithstanding its polygamous character, is recognized by this court when exercising its matrimonial jurisdiction, invoked in this case. It would be strange if English law were to afford no recognition of polygamous marriages when one realizes that England is the centre of a great Empire, whose Mohammedan and Hindu subjects number many millions; and, as Mr. Beckett points out, in his admirable article on Polygamous Marriages in 48 Law Quarterly Review, at p. 345, "polygamous "marriages are, of course, recognized as lawful and regulated "by the law of many countries forming a part of His Majesty's "Dominions, and which are governed under laws depending "ultimately upon statutes of the Parliament of the United "Kingdom, and the Privy Council, exercising its appellate "jurisdiction over the courts of these countries, has frequently "recognized the legal validity of such marriages." None the less, the standard text books suggest that the only kind of marriage which English law recognizes is one which is essentially the voluntary union, for life, of one man with one woman, to the exclusion of all others. The Divorce Court, for obvious reasons, would not entertain a matrimonial cause for the purpose of granting relief or enforcing rights, in respect of a marriage which lacks the characteristics of monogamy; this was the decision of Lord Penzance in *Hyde* v. *Hyde* (1); but he was most careful to conclude his judgment with the following words: "All that is intended to be here decided is that as "between each other they are not entitled to the remedies, the "adjudication, or the relief of the matrimonial law of England."

(1) (1866) L. R. 1 P. & D. 130.

There are, however, certain passages in the authorities, though only obiter dicta, which go far beyond this and support the text book view. I do not propose to refer to these passages, because I have little doubt that they are the dicta referred to by Lord Maugham L.C., in the course of his speech before the Committee of Privileges in the House of Lords in the *Sinha Peerage Claim* (1) on July 25, 1939. There Lord Maugham says : " On the other hand, it cannot, I think, be doubted now " (notwithstanding some earlier dicta by eminent judges) " that a Hindu marriage between persons domiciled in India " is recognized in our courts, that the issue are regarded as " legitimate, and that such issue can succeed to property in this " country with a possible exception which will be referred to " later " ; and further in his speech he says : " Having regard " to the domicile of the parties to the marriage at the date when " it was solemnized, the marriage would properly be treated as " valid in this country for all purposes, except it may be the " inheritance of real estate before the Law of Property Act, " 1925, or the devolution of entailed interests as equitable " interests before or since that date, and some other exceptional " cases." The parties referred to by Lord Maugham were the petitioner's parents, who were at all times domiciled in the Presidency of Bengal, British India, and whose marriage took place in Bengal according to the formalities prescribed by Hindu law and usages, and was therefore polygamous ; and it was six years later, but before the birth of the petitioner and long before the date of the patent, that the petitioner's parents joined a religious sect, one of whose main tenets was monogamy, and thus, the petitioner's father not having married a second wife in the interval, converted a polygamous marriage into a monogamous one.

I have come to the conclusion that the text book view is wrong and, relying as I do on the above passages from Lord Maugham's speech, I ought to recognize this Hindu marriage as a valid marriage. To refuse recognition would mean that the respondent would be lawfully married to his Hindu wife in India, and to his English wife in England, but if he brought his Hindu wife to this country and lived with her here, he would be living in adultery with her. It would mean that if the respondent were to live with his Hindu wife in India for a part of the year and for the remainder of the year live with his English wife in England, he would be living with his lawful wife in each

(1) Journals of the House of Lords, 1939, vol. 171, p. 350.

1945

SRINI VASAN (OTHERWISE CLAYTON) v. SRINI VASAN

Barnard J.

country. It would therefore mean that English law would be encouraging polygamy and not frowning on it. Again, a Hindu marriage is indissoluble; but, according to Mulla on Hindu Law, 9th ed., p. 513, a Hindu wife, deserted by her husband, can sue him for restitution of conjugal rights in the civil courts of British India. If, therefore, the respondent deserted both his Hindu wife and his English wife, he could be sued for restitution of conjugal rights by both wives, in the courts of their respective countries, and he might be ordered by those courts to return to two different wives in two different parts of the world. To deny recognition of a Hindu marriage for the purpose in hand would, in my opinion, be to fly in the face of common sense, good manners and the ordered system of tolerance on which the Empire is based; and, as I decide, to deny such recognition would be bad law. I, therefore, recognize as a fact the respondent's Hindu marriage, which was subsisting at the time he went through the ceremony of marriage with the petitioner, and I hold that this ceremony is a nullity and the petitioner is entitled to a decree nisi, with costs.

Solicitors: *Burton, Yeates & Hart.*

V. J. M. S.

C. A.

1945

Oct. 22; *Nov.* 13.

Lord Greene M.R., du Parcq and Morton L.JJ.

FENSTON *v.* FENSTON.

Divorce—Costs—Appeal against order giving custody of child to wife—Co-respondent supporting wife's application—Appeal to which co-respondent was not a party—Allowance of appeal—Form of order as to costs—Matrimonial Causes Rules, 1944 (*St. R. & O.* 1944, *No.* 389/*L.* 16), *r.* 33, *sub-r.* 1.

By r. 33, sub-r. 1, of the Matrimonial Causes Rules, 1944 (which re-enacts in identical terms r. 33, sub-r. 1, of the Matrimonial Causes Rules, 1937) "After entering an appearance, a respondent or co-respondent may, without filing an answer, be heard in respect of any question as to costs and a respondent spouse may, without filing an answer, be heard as to any question of custody of or access to any children of the marriage."

A husband, having obtained a decree nisi against his wife in the usual form, which "condemned the co-respondent in the costs incurred and to be incurred on behalf of the said petitioner in this cause," the respondent wife obtained, after decree absolute, an order giving her the custody of the child of the marriage, with leave

to take him out of the jurisdiction to the home of the co-respondent (whom she had married) in Czechoslovakia. The husband's appeal against this order having been allowed, he asked for costs against the co-respondent, who was not a party to the appeal:—

Held (1.) that the order for costs in the decree nisi was correctly interpreted by the practice of the Division as covering more than the costs of the petition itself, and extending to future costs, not automatically, but if the judge, in the exercise of his discretion, ordered that they should be costs in the cause.

(2.) A co-respondent against whom it was intended to ask for costs ought to have notice of the application, and an opportunity of being heard on it, in compliance with r. 33. Provision should be made, by rule if necessary, for ensuring such notice.

(3.) There appeared to be no reason for limiting the right to be heard on questions of costs to a co-respondent who had entered an appearance, as in the present rule.

(4.) That the form of order for costs in the decree nisi was misleading, since it might give the co-respondent the belief that he was automatically liable for all future costs, and it should be amended to run as follows: "condemned the co-respondent in the "costs incurred on behalf of the said petitioner in this cause, and "such further costs to be incurred on behalf of the petitioner as "the court shall direct to be costs in the cause."

(5.) On the facts of the present case the co-respondent had actively supported the wife's application, and was therefore obviously aware of it, so there was no injustice in ordering him to pay the costs, including those of the appeal.

APPEAL from Denning J.

The only question calling for a report on this appeal was as to the proper order for costs. The husband petitioner had obtained a decree nisi on the ground of his wife's adultery with the co-respondent, Stefan Varadi, a Czechoslovakian subject. The decree nisi was in the usual form (see Rayden on Divorce, 4th ed., p. 705, form No. 96), and "condemned "the co-respondent in the costs incurred and to be "incurred on behalf of the said petitioner in this cause." After decree absolute the wife and the co-respondent were married. Two summonses were taken out, one by the husband for custody of the infant child of the marriage and one by the wife for leave to take the child out of the jurisdiction. Denning J. made an order giving the wife custody with leave to take the child out of the jurisdiction to Czechoslovakia, and ordered that the costs of the wife's summons should be costs in the cause. The co-respondent had supported the wife's application by swearing an affidavit that he had an affection for the boy, and wished to treat him as his own son, and to take him back

C. A.
1945
FENSTON
v.
FENSTON.

with his mother to Czechoslovakia. From that order the petitioner appealed, and the Court of Appeal discharged Denning J.'s order, but adjourned the case for argument on the question whether an order for costs ought to be made against the co-respondent, who was not a party to the appeal.

Beyfus K.C. and *Marshall Reynolds* for the petitioner. Under r. 33, sub-r. 1 of the Matrimonial Causes Rules, 1944 (1), either respondent or co-respondent, who has entered an appearance—as this co-respondent did—may be heard on any question of costs. He is now out of the jurisdiction.

[Lord Greene M.R. Does "costs" refer to all costs, including costs subsequent to decree, or only to costs of the petition? Is there any rule to enable a co-respondent to be served? He cannot be heard if he is not notified that the question is to be raised.]

Rule 56 of the Matrimonial Causes Rules provides for the filing of a statement as to the nature of any proceedings relating to the children of the marriage, while r. 8 (1.) (*c*) as amended by the Matrimonial Causes Rules, 1944, would appear to mean that the exception dispensing with personal service does not apply to a co-respondent.

[Morton L.J. This very important type of application seems to be left out of the rules.]

[Lord Greene M.R. The rules provide that the co-respondent may be heard, but contain no provision for service on him of the summons, nor for making him a respondent to the summons. Rule 8 makes provision for service of notice of an application, but is silent as to a summons.]

The usual form of order on decree nisi does not cover all ancillary costs: the practice is to ask for the costs to be made costs in the cause, in which case the co-respondent has to pay them. If the judge refuses to make them costs in the cause they may be ordered to be paid either by the petitioner or the respondent. Section 34 of the Matrimonial Causes Act, 1857, which deals with costs, was repealed by the Judicature (Consolidation) Act, 1925, and costs are now dealt with under the general power given by s. 50 of that Act.

[They referred to *Gill* v. *Gill and Hogg* (2), which shows that the present form of order goes back almost to the Act of 1857; *Smithe* v. *Smithe and Roupell* (3); *Irwin* v. *Irwin*

(1) For text of r. 33, sub-r. 1, see headnote.

(2) (1863) 3 Sw. & Tr. 359.

(3) (1868) L. R. 1 P. & D. 587.

and Layard (1).] As to the powers of the Court of Appeal see R. S. C. Or. 58, r. 4.

Levy K.C. and *William Latey* (respondent's counsel in the appeal) as amici curiæ on behalf of the respondent. On the face of the order in the usual form, all future costs in the cause at any stage would be bound. It is questionable whether the judge on any subsequent application would have any discretion as to costs. It is a particularly dangerous form—and it is the only one used—because on any ordinary petition costs are asked against the co-respondent, and this form of order is used though the judge may not have applied his mind to the question. If it is always interpreted as leaving the court full discretion on further application, it may do comparatively little harm. The practice seems to be correctly stated in note (*d*) on p. 350 of Rayden on Divorce, 4th ed : " Costs of primary applications " for custody have been allowed on taxation of costs against " the co-respondent as incidental to the suit, but subsequent " differences between the petitioner and the respondent as to " custody or access do not come within the principle stated."

Cur. adv. vult.

November 13, 1945. The judgment of the court was read by :—

LORD GREENE M.R. After we had delivered judgment allowing the husband's appeals against the orders made on the wife's summons for leave to take the infant out of the jurisdiction and on the husband's own summons for custody, a question arose as to the proper order to be made in relation to the costs of the two summonses and of the appeal. Denning J. directed that the costs of the wife's summons should be costs in the cause. The effect of this was to make them payable by the co-respondent, who by the language of the decree nisi itself was condemned in the " costs incurred and to be incurred " on behalf of the said petitioner in this cause." Denning J. made no order as to the costs of the husband's summons for custody. Before us Mr. Beyfus, on behalf of the successful appellant, asked for an order that the costs of the summons for custody (which in the result was successful) should also be made costs in the cause and that the co-respondent should be ordered to pay the costs of the appeal. The co-respondent was not a party to either summons, nor, of course, was he a respondent

(1) (1890) 59 L. J. (P. D. & A.) 53.

C. A.
1945
FENSTON
v.
FENSTON.

to the appeal. Mr. Levy, however, who appeared for the wife, raised, as amicus curiæ, the question whether it was proper to make any order the effect of which would be to impose a liability for costs on the co-respondent, and as this question appeared to us to be one of substance we adjourned it to enable Mr. Beyfus to argue as to the propriety of the order for which he was asking.

The first matter for consideration is the form of the order as to costs contained in the decree nisi, a form which counsel from their researches informed us had been in use for a great number of years and was the form regularly used. It appears that in practice the order as to costs "to be incurred" is interpreted in the Divorce Division not as covering by its own force all future costs in the proceedings, but as covering only such future costs as the court may consider to be fairly payable by the co-respondent and may accordingly direct to be costs in the cause. Indeed, if the order on its true interpretation went further than this and by its own force imposed a liability for all future costs on the co-respondent it would, in our opinion, be an improper order. Costs are in the discretion of the court and it is not competent to the court to fetter its discretion as to the costs of future applications in the cause, the circumstances of which cannot possibly be known to it at the date of the decree nisi. Such future applications may relate to a large variety of questions and may take place over long periods of years and the extent to which, if at all, the co-respondent ought to be made liable for the costs of them must in each case depend on the circumstances.

In view of the practice thus observed in regard to the meaning of the common form of decree nisi, the question arises as to the jurisdiction of the judge to order costs of an application made subsequently to the decree to be borne by a co-respondent who is not a party to it and is not before the court. In the present case the co-respondent (who had duly appeared to the petition) obviously knew of these applications in relation to the infant and he took an active part by swearing an affidavit in support of the mother's case. We thought it our duty, however, to satisfy ourselves that the order was in principle one which could properly be made and this involved an examination of the larger question. It seemed to us that cases might well occur where the co-respondent would not necessarily have any knowledge of the application and ought not in justice to be ordered to bear the costs, or to be ordered to bear them

without having an opportunity of being heard and bringing before the court any facts and considerations which might be relevant to the question of costs. The language of r. 33, sub-r. 1, in some sense suggests that the costs referred to are the costs of the petition itself and do not include costs of applications subsequent to decree. But we accept the view, supported by both counsel, that the words cannot be so restricted but confer a general right to be heard on any question as to costs whenever it may arise. This interpretation appears to us to be confirmed by the reference to questions as to custody or access which follows immediately; since such questions obviously may, and often do, arise subsequent to decree and during a period of years. If this view is right, we start with the proposition that a right to be heard on the question of the costs of an application, whenever the question may arise, is conferred on a co-respondent who has entered an appearance but not on a co-respondent who has not done so. But the rules do not appear to contain any provision as to notifying the co-respondent that a question of costs which may affect him is to be raised, or otherwise ensuring that the right to be heard conferred by r. 33 is made effective. Applications subsequent to decree appear to fall into two classes (*a*) "applications for "ancillary relief," which are defined in r. 3, sub-r. 2, and are made by notice—this class does not include applications relating to custody or access—(*b*) other applications which are made by summons under r. 3, sub-r. 3. The rules do not in terms provide for making a co-respondent party to an application of either class or for serving him with a copy of the notice or summons or otherwise informing him that the application is being made, notwithstanding that in every case he is in peril of having an order for costs made against him, and notwithstanding that, at any rate if he has entered an appearance, he has under r. 33 a right to be heard. So far as we have been informed it is not the practice in the Division to require that the co-respondent should be made a respondent to an application or that any notice should be given to him. It may be that when the rules were framed it was considered that before making an order which would result in the co-respondent being made liable for costs of an application the court would satisfy itself that he was aware of the fact that the application was being made.

In the present case Denning J. appears to have followed the practice of the Division in ordering the co-respondent to pay the costs of the wife's application. On the facts it was clear

C. A. 1945 FENSTON v. FENSTON.

that the co-respondent was aware of the application and was indeed actively supporting it. We think, therefore, that in view of the present position under the rules his order can be supported. Similarly, the husband's application for custody having succeeded before us, we think that the costs of that application should also be paid by the co-respondent. The necessity for the husband's application arose from the facts disclosed in the evidence filed in support of the mother's application and it is not really possible to disentangle the two applications so as to treat the costs in different ways. The co-respondent must also pay the costs of the appeal. We may remark that during the period of the adjournment the husband took the precaution of serving the solicitors for the co-respondent with a notice of his intention to ask for costs against the co-respondent.

But although we think that we can without injustice, and in accordance with the rules as they at present exist, dispose of the question in this actual case, we think it right to call attention to one or two considerations which make the present position in our view unsatisfactory. The principle on which costs of applications subsequent to decree may be awarded against a co-respondent is, of course, an intelligible one for, broadly speaking, it is his conduct which has caused such costs to be incurred. But it does not appear to be the practice, nor is it suggested that it should be the practice, to award such costs against the co-respondent in every case. The court exercises its discretion and only awards such costs against the co-respondent where it is satisfied that it is just to do so. But surely the question whether it is just or not ought not to be decided against the co-respondent unless he has a real opportunity of placing the facts before the court and presenting such arguments as he may think appropriate. Otherwise the court may well make its order in ignorance of relevant facts which would have shown that an order for costs against the co-respondent would be unjust. The applications in question which may be made are many and various: in the matter of infants, in particular, applications may be made year after year. In some cases it may be just to order the co-respondent to pay the costs even after a long time has elapsed since the decree: in others it may be unjust to award costs against him even where a short time has elapsed since decree. Every case must depend on its own facts. Rule 33 provides that he shall be entitled to be heard on questions of costs provided he has

entered an appearance. It would in our opinion be right and convenient that provision should be made, if necessary by rule, for making this right effective, by providing that any party to an application who intends to ask for an order for costs against the co-respondent should give him due notice to that effect, or possibly by providing that in any order for costs made against a co-respondent in his absence he should be given the right to apply to discharge it within a limited period after it is served upon him. We see no reason why the right to this measure of protection should be limited to the case of a co-respondent who has entered an appearance.

There is a certain amount of authority on the subject. In *Gill* v. *Gill and Hogg* (1), the costs of the wife of an application by the husband for a variation of a settlement were ordered to be paid by the husband. The co-respondent was no party to this application. When the husband's costs of the petition came to be taxed against the co-respondent the registrar allowed the husband's costs of the application to vary, including the wife's costs which the husband had been ordered to pay. It was held that the registrar had acted rightly and that the co-respondent was liable for these costs. This decision is not really helpful for present purposes since it was only on taxation that these costs were cast upon the co-respondent and on the taxation he naturally appeared and was heard. In *Stone* v. *Stone and Brownrigg* (2), the costs of a husband's application to vary, in so far as it was successful, were ordered to be paid by the co-respondent who was no party to the application. The question of his right to be heard on the matter of costs was not raised, but as he had married the respondent the court perhaps assumed that he had notice of the application. *Smithe* v. *Smithe and Roupell* (3) was also a case of variation. Here, too, the respondent and the co-respondent had married. The costs of the applicant and of the trustees were ordered to be paid by the co-respondent. In *Irwin* v. *Irwin and Layard* (4), the co-respondent was ordered to pay the costs of apportioning and settling the damages which had been awarded against him. The order was made on a motion asking that these costs should be paid by the co-respondent. He was the respondent to the motion and was heard in opposition to it. It may be noticed that in this case Butt J. observed that the costs in question " came within the usual order made at the

(1) 3 Sw. & Tr. 359.
(2) (1864) 3 Sw. & Tr. 372.
(3) L. R. 1 P. & D. 587.
(4) 59 L. J. (P. D. & A.) 53, 54.

C. A.
1945
FENSTON
v.
FENSTON.

" trial where a co-respondent was condemned in the costs of the " suit." This appears to mean that they were covered by the words " to be incurred " contained in the decree. This may very well be correct since the costs of apportioning and settling damages are merely consequential on and incidental to the award of damages itself. But the co-respondent obviously had a right to be heard upon that question.

These authorities do not appear to us to do more than establish the self-evident proposition that the court has full power to order the costs of applications subsequent to decree to be borne by the co-respondent. They do not in our view support the view that any such costs automatically and without further order fall on the co-respondent by force of the language of the decree, or the view that the court has power to make an order against the co-respondent in his absence without his having an opportunity of being heard. Once it is conceded, as it must be, that the costs of such applications are in the discretion of the court and that the discretion must be exercised in the light of the particular facts, it appears to us to follow of necessity that the court ought not to make an order against a co-respondent unless it is satisfied that the co-respondent has had notice of the application. It is, we think, correct to say that by the language of the decree the co-respondent must at the least be taken to be warned that future costs may be awarded against him and if, with knowledge that an application is being made, he chooses not to take any steps to obtain a hearing he cannot complain.

This last observation as to the warning given by the language of the decree suggests a criticism of the common form of order. As we have pointed out, the effect of the order is not what on its face it would appear, at least to an uninstructed person, to mean, for it does not mean that the co-respondent will have to bear future costs in any event. Before they can be thrown upon him a further order is required by which the costs in question are made costs in the cause. And it is just because such a further order is required that the co-respondent should have the opportunity of objecting to it. But the form of the decree is, in our opinion, misleading and might well induce a co-respondent, who did not have the advantage of skilled advice as to its meaning, to understand that he would have to pay all future costs in any event and so to refrain from taking any steps to protect himself. The order should, in our opinion, be altered so as to run as follows: " condemned the co-

C. A.
1945
FENSTON
v.
FENSTON.

" respondent in the costs incurred on behalf of the said " petitioner in this cause and such further costs to be incurred " on behalf of the petitioner as the court shall direct to be " costs in the cause."

Solicitors for the husband: *Spiro & Steele.*

Solicitors for the wife: *Gordon Gardiner, Carpenter & Co., for J. R. C. Miller, Portsmouth.*

J. W. H.

THE PRINCESA.

C. A.
1945
July 9.
Scott, MacKinnon and Lawrence L.JJ.

Shipping—Towage—Cardiff tug owners' rates for steamers—" Towage " or assistance of steamers not normal."

The plaintiffs' tugs towed the defendants' twin screw steamship from Cardiff Roads into one of the Cardiff docks. Under the Cardiff tug owners' rates for " steamers, Cardiff, Penarth and " Barry " the charge for " normal assistance " into dock was 60*l.*, but as one of the engines of the defendants' ship was out of order the plaintiffs claimed that the rate applicable was that for " towage or assistance of steamers not normal and auxiliary " vessels docking or undocking," under which the charge was 404*l.* 17*s.* 9*d.* A further provision in the table of charges was that neither rate applied to " steamers or vessels ashore, in distress or " not under control " :—

Held, that the words " not normal " applied to the word " steamers " and not to " towage or assistance " ; that the ship was a normal vessel of her type and could not be said to be abnormal because she happened to have some of her gear out of order and was not exercising all her normal powers ; and therefore that the lower rate of charge was the one applicable.

Judgment of Lord Merriman P. [1945] W. N. 98 affirmed.

APPEAL from Lord Merriman P. sitting with Elder Brethren in an action of towage.

The plaintiffs were Edmund Handcock, Ld., a firm of tug-owners ; the defendants were the Furness Argentine Lines, Ld., owners of the twin screw steamship *Princesa*, a vessel of 8,371 tons. On August 9, 1944, the defendants' agent at Cardiff orally engaged the services of four of the plaintiffs' tugs to be in attendance on the following day in Cardiff Roads to take the *Princesa* into Queen Alexandra Dock. He stated that the vessel was only working one engine, as her port engine

C. A.
1945
THE PRINCESA.

was out of order, and that she was coming from Avonmouth with the assistance of a Bristol tug. The tugs towed the *Princesa* into dock, a distance of about a mile. For these services, which lasted about 15 minutes, the plaintiffs claimed 404*l.* 17*s.* 9*d.* under a table of charges headed "Cardiff Tug "Owners. Rates for Steamers Cardiff Penarth and Barry" for "towage or assistance of steamers not normal and auxiliary "vessels docking or undocking." The defendants' case was that the services were "normal assistance" from Cardiff Roads to Queen Alexandra Dock, for which it was admitted that the charge was 60*l.*, and this sum they had paid into court. There was a further provision in the table of charges that neither of the rates applied to "steamers or vessels "ashore, in distress or not under control."

The President (Lord Merriman) said that the sole question was whether the fact that the vessel's port engine was, at the material time, out of order, made her a case of a steamer not normal; or, alternatively, on another interpretation of the contract, did it make the assistance rendered to her assistance which was not normal? He was referred, in the passage which immediately followed the table of rates for normal assistance, to this phrase: "Rate for towage or "assistance of steamers not normal and auxiliary vessels "docking or undocking."

The defendants argued that the words "not normal" ought to be attached to the word "assistance," so that one got a clean-cut contrast between the normal assistance in the preceding table and the abnormal assistance provided for in the rates in the two succeeding lines. He was unable to accede to that view; he did not think it was possible to distort the sentence so as to take the words "not normal" from the rather peculiar position in which they were placed and attach them, as they would have to be attached, not merely to "assistance" but to "towage," so as to make it read in effect, "Rate for" (if he might substitute "abnormal" for "not normal"), "abnor- "mal towage or assistance of steamers and auxiliary vessels "docking or undocking." He thought he must construe it on the basis that the abnormality was attached to the word "steamers," and to nothing else. He was the more inclined to that view because of the introduction of the words "auxiliary "vessels." It seemed to him to be quite a sensible provision to contrast with "normal assistance," assistance given in docking auxiliary vessels. From the tug's point of view,

they were much less handy to deal with, and one saw a business reason for putting them in a separate category. They were only half-steamships after all; they were more sailing ships than steamships. That was why special provision was made for them, and that also, in his opinion, emphasized the point that it was to the character of the vessel and not to the nature of the service that the quality of abnormality was intended to be attached in that sentence. How, then, could sense be made of a "steamer not normal?" The plaintiffs contended that there was only one way, and that was by saying that she was normal if she was exercising all her usual powers; in other words, if she was a normal steamer when she had her starboard and her port engines working, she was not a normal steamer if she had only her starboard engine working. He did not think that was right. Nobody disputed that the *Princesa*, if she had had her port engine in use, would be a normal steamship, and if any other construction was possible, he did not think it could be said that a normal steamship which was at the moment not exercising all her normal powers was the same thing as an abnormal steamship.

He did not think he was driven to any such conclusion. There were vessels propelled by machinery which he thought it was intended to cover by those words, for example, floating cranes, which were often self-propelled by steam, and dredgers, and one could well understand the reason for putting them in the same sort of category as auxiliary vessels for the purpose of attaching special towage rates to them. That seemed to him to be the natural interpretation of this sentence, and, when one had arrived at that conclusion, one had got something like a business interpretation of the whole document. One got what was called normal assistance, that is to any ordinary ship, in the specified geographical area, and the rates were fixed by the ton. At the other end of the scale one had salvage services pure and simple to which towage rates ex hypothesi would not apply, and in between those two one had towage or assistance to steam vessels which, in their own inherent character, were not normal, and to auxiliary vessels which were only partly steam vessels. That seemed to him to be the proper interpretation of the contract, and he was not prepared to make what he considered would be a strange and fanciful interpretation by saying that a perfectly normal steamship, which happened for the moment to have some of her gear out of order, was an abnormal steamship, and impose particular

C. A.

1945

THE PRINCESA.

rates in respect of her. That being so, the defendants' contention was right. The plaintiffs appealed.

W. Clothier K.C. and *R. E. Gething* for the plaintiffs. The words " not normal " have reference to a steamer which is normal in type but not in a normal condition. A steamer " not normal " is not necessarily the same thing as an abnormal steamer. The *Princesa* was a normal vessel in an abnormal condition for the time being ; she required unusual assistance and had to have a tug even in open waters. On the President's construction of the clause there is no scale of charges applicable for special assistance unless the services are in the nature of salvage.

Sellers K.C., Owen Bateson K.C. and *Boyes* for the defendants were not called on.

SCOTT L.J. stated the facts, and continued : I have seldom seen terms of contract better calculated than these towage terms to promote litigation. There are three classes of rates upon which tugs will be hired out by Cardiff tug owners. Class I. I will call the ordinary terms for ordinary ships. The second is for ships that are not ordinary, divided into two classes first, " non-normal steamers," and, second, what are called " auxiliary vessels." The third class relates either to the position in which an individual ship may find itself by reason of external circumstances or to the condition of its own powers of propulsion, due to things which may have happened inside the ship. Class I. is for normal assistance from Cardiff roads to docks, locks and basins in Cardiff or Penarth, i.e., from the roads to the place of delivery of the ship ; or vice versa. Similarly, with regard to Barry roads and Barry docks. Then comes class II. Those rates are expressed to be " for towage " or assistance of steamers not normal and auxiliary vessels " docking or undocking." That class relates in my view solely to the special types of vessels covered by its terms, viz. (*a*) " not normal " and (*b*) " auxiliary vessels." Parenthetically the *Princesa* was of a perfectly ordinary type and could not possibly, but for certain circumtances, come within anything but the ordinary class I. Class III. throws light on the first two classes, in that its rates are not to apply to " steamers " or vessels ashore, in distress or not under control."

At the time the bargain was made the representative of the owners of the *Princesa*, when asking for the four tugs, told the tug owners that one of the ship's engines was out of use. The

tug owners' representative said nothing at all about that meaning a higher rate of charge. He seemed to treat it as an ordinary everyday towage contract coming under class I. In my view the principle of law that in case of doubt it is right to interpret a written contract "contra proferentem" has an analogous application. If the tug owners wanted to say that because of the ship having one engine out of action they would require an exceptional rate, it was for them to say so. In the absence of anything said at the time, I should infer that there was a contract for ordinary rates. But it was argued that the phrase "not normal" as applied to vessels ought to be interpreted as not only referring to the type of ship but as extending to the condition of the ship; so that with one engine out of use the ship would not be "normal." In my view class II. has nothing to do with the condition of the ship at all, but only with the type of ship. What is meant by "auxiliary vessel" I do not know. It used to mean in the old days when ships sailed the seas, a sailing ship which had an auxiliary engine to help her in calm weather. I will assume that the word has still that meaning, although there is provision in the towage scale of class II. which makes me doubtful about it. In my view class II. has nothing to do with this case. Class III., the last class in the printed terms, cannot apply to the circumstances in which this ship was, for she was not a "vessel ashore, "in distress or not under control." For the above reasons I hold that this ship was clearly a "normal" ship making a contract at a normal rate and that the judgment in favour of the defendants for a lower rate than that claimed was correct. I am in agreement with the judgment of the learned President.

The appeal is dismissed with costs.

MACKINNON L.J. I agree with the result proposed by my Lord. The judgment of the President seems to me to be so clearly right that I need not repeat what he has said.

LAWRENCE L.J. I agree.

Appeal dismissed.

Solicitors for plaintiffs: *Ingledew, Brown, Bennison & Garrett, for Ingledew & Sons, Cardiff.*

Solicitors for defendants: *Middleton, Lewis & Clarke, for Middleton & Co., Sunderland.*

E. C. M. T.

1945

July 23.

Lord Merriman P. and Wallington J.

UNDERWOOD *v.* UNDERWOOD.

Maintenance order—Summons by husband to vary amount payable—"Fresh evidence" and "cause shown"—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict., c.* 39), *s.* 7—*Criminal Justice Administration Act*, 1914 (4 & 5 *Geo.* 5, *c.* 58), *s.* 30, *sub-s.* 3—*Money Payments (Justices Procedure) Act*, 1935 (25 & 26 *Geo.* 5, *c.* 46), *s.* 9.

Although by virtue of the provisions of s. 9 of the Money Payments (Justices Procedure) Act, 1935, an application made under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, to a court of summary jurisdiction on cause shown to vary the amount of any weekly payment to be made under a maintenance Order need not be supported by "fresh evidence" (that is to say, evidence of something which has happened since the hearing at which the order was made or evidence which has come to the knowledge of the applicant since the hearing but could not have been obtained by him by reasonable efforts before that time) and can therefore be supported by evidence which was available to the applicant at the previous hearing but not then produced by him, yet when evidence was then produced by him, the same evidence cannot again be produced as the sole cause for varying the amount of the monetary award. On the other hand the evidence produced at the subsequent hearing need not be confined to evidence of means, but may include evidence of the conduct of the party attacked, which may be relevant on the question of amount.

APPEAL from a decision of the North London police court magistrate.

In April, 1944, the wife obtained a maintenance order against her husband on the ground of his desertion, and was awarded 25*s.* weekly for herself and 10*s.* weekly for the child of the marriage, of whom she was given the custody. The husband's defence to the charge of desertion was that his wife had committed adultery with a certain named man, and he gave evidence in support of this allegation, which was, however, not accepted by the magistrate. In June, 1945, the husband issued a summons to have the maintenance order discharged on the ground of his wife's adultery but as it was apparent that he was relying on the alleged adultery prior to the making of the order, and had no "fresh evidence" of adultery since that date, the summons was amended at the instance of the magistrate to one to vary the order on "cause shown." In support of the amended summons the husband proferred the same evidence as to his wife's adultery as had been adduced the previous year. The wife did not give evidence in denial of the allegations of

1945

UNDERWOOD v. UNDERWOOD.

adultery but through her solicitor relied on there being no "fresh evidence" on which the magistrate could act.

The magistrate varied the order by reducing the sum payable to the wife from 25*s.* to 1*s.* per week. The wife appealed.

King Anningson for the wife.
Elliot Gorst for the husband.

LORD MERRIMAN P., after stating the facts, continued: The case in my opinion raises a very interesting and I think important question. The whole objection to the case which was presented by the husband was that the evidence by which he sought to establish his proposition had all been available to him on the earlier occasion. Much of it was, in fact, the same evidence, but at any rate it was based upon material which was clearly in his possession at the time, and it is not really disputed for the purposes of this appeal that that was established. That being so, the magistrate took the view, the correctness or otherwise of which I will examine in one moment, that this summons to discharge the order was wholly misconceived, because it was not possible for the husband to assert that he was founding himself on "fresh evidence" as those words have been interpreted in a well-known series of cases. The magistrate, therefore, suggested that it was possible for him, if the summons were amended so as to be a summons not to discharge the order, but to vary the amount payable to the wife, to deal with that issue, and that issue only, on the same material. He did so, and decided to reduce the amount from 25*s.* to 1*s.* a week.

Before I go further I wish to say one word about what actually happened in the court below. It appears that the suggestion emanated from the magistrate and was assented to by both sides. We are now told that in fact it was not assented to by the solicitor for the wife, though I think it is rather a question of degree than anything else, for the position appears to have been that he did not actually object, seeing that the only result of an objection would probably have been that the case would have been adjourned and a fresh summons issued on that ground. The parties would then have got to precisely the same position. One mistake the solicitor I think did make. As the summons was amended, and nothing thereafter was being dealt with except the question of variation, he rested himself, at the conclusion of the case, on a submission which was based entirely

1945

UNDERWOOD v. UNDERWOOD.

Lord Merriman P.

on the words " fresh evidence." For that reason, and because he was basing himself on the proposition that it was not open to the magistrate to act on evidence which was available at the previous hearing, he declined to call the wife. This led in effect to the result that the magistrate had uncontradicted evidence tending to show adultery, and evidently has based his decision on the assumption that adultery was proved.

The question is whether that was or was not the right way of dealing with this case. In the first instance it is necessary to examine quite shortly the result of subsequent legislation on s. 7 of the Summary Jurisdiction (Married Women) Act, 1895. I propose to deal with this shortly, because I think the matter is concluded by authority, but I am bound to say, speaking for myself, that this is the first time—though the matter has arisen incidentally in other appeals—when it has been brought forcibly to my attention in one of these appeals under the Summary Jurisdiction (Married Women) Act. By s. 7 of the Act of 1895, where an order has been made, the court " may, on the " application of the married woman or of her husband, and on " cause being shown on fresh evidence to the satisfaction of the " court at any time, alter, vary or discharge any such order, " and may upon any such application from time to time increase " or diminish the amount of any weekly payment ordered to " be made," and so on, so long as it does not in any case exceed the statutory limit of 2*l*. It is undoubted, as a matter of history, that not merely the power to alter, vary or discharge the order was conditioned by the express words that it must be on fresh evidence, but also there was imported into the second branch of that sentence—namely, that which dealt with the power to increase or diminish the amount of any weekly payment—the same restriction, that it must be on fresh evidence.

I need not go at large into the meaning of the words " upon " fresh evidence." Suffice it to say that the passage in the judgment of Hill J. in *Timmins* v. *Timmins* (1), in which, relying on the decision in *Johnson* v. *Johnson* (2) he says " ' fresh evidence ' . . . . means evidence of something which " has happened since the former hearing or has come to the " knowledge of the party applying since the hearing, and could " not by reasonable means have come to his knowledge before " that time," has received favourable notice in the Court of Appeal. It is not necessary to dilate on that because, as I

(1) [1919] P. 75, 80. (2) [1900] P. 19.

have said, it is not disputed for the purposes of this case that the evidence available to the husband on the second hearing did not fall within any acceptable definition of what is fresh evidence.

On s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, the meaning of which was thus established, two subsequent enactments have had effect. The first is s. 30, sub-s. 3, of the Criminal Justice Administration Act, 1914, which reads as follows: "Any order made either before or "after the commencement of this Act by a court of summary "jurisdiction for the periodical payment of money may, upon "cause being shown upon fresh evidence to the satisfaction "of the court, be revoked, revived, or varied by a subsequent "order." It is clear, of course, that that covers very much the same ground as is covered by s. 7 of the Act of 1895, but it is established by *Dodd* v. *Dodd* (1) that this sub-section, and indeed all other relevant matter in this part of the Act, apply with equal force to the Summary Jurisdiction (Married Women) Acts, and the effect, among other things, was to introduce into this particular legislation relating to married women the conception of revival of an order which had been discharged.

The other Act which affects the matter is the Money Payments (Justices Procedure) Act, 1935, whereby it is enacted by s. 9, that in sub-s. 3 of s. 30 of the Criminal Justice Administration Act "the words 'upon fresh evidence' shall cease to "have effect"; and they are repealed by s. 16, sub-s. 2, and the schedule; section 9 says: "and fresh evidence shall "not be required as a condition of the exercise of the power "conferred on a court of summary jurisdiction by s. 7 of the "Summary Jurisdiction (Married Women) Act, 1895, to "increase or diminish the amount of weekly payment."

In my opinion, without going through the authorities in detail, it is established by *Colchester* v. *Peck* (2) and *Rex* v. *Copestake* (3), that the combined effect of these two sections is to deal only with that part of an order which relates to periodical payments, and to leave unaffected the limitations imposed by the words "upon fresh evidence" in relation to the substantive part of an order under the Summary Jurisdiction (Married Women) Act or any ancillary part of such order which is not connected with such periodical payments. From this it follows that the effect of s. 7 of the Act of 1895 may be thus

(1) [1920] 1 K. B. 71.
(2) [1926] 2 K. B. 366.
(3) [1927] 1 K. B. 468.

1945

UNDERWOOD v. UNDERWOOD.

Lord Merriman P.

stated: that on an application by the husband or wife to alter, vary or discharge any such order the words "upon fresh "evidence" which actually appear in the section still remain in full force and effect, but in relation to an application merely to increase or diminish the amount, the gloss which was placed on the section by importing the words "upon fresh evidence" has disappeared. Those words are no longer to be treated as having any force or effect in connexion with a mere question of amount, therefore it was not, as the magistrate rightly held, open to this husband to seek, as he originally did seek, to discharge this order on this particular evidence of the wife's adultery, for the reason that by no possibility could it be held to be fresh evidence within the meaning of those words; but it was open to him to get the amount varied on cause shown to the satisfaction of the court, and in relation to that application he was untramelled by the implication of the words "upon "fresh evidence." I reject altogether the suggestion that "cause shown" in relation to an application to vary an amount can only be evidence relating to figures. I would say, first of all, again referring to the judgment of Hill J. in *Timmins* v. *Timmins* (1), that I am entirely in agreement with his way of approaching the matter. He says: "But they can dis-"charge or vary their order only upon cause shown. In my "judgment that means cause shown for discharging that "part of the order which is sought to be discharged, and the "order cannot be discharged as a whole unless cause is shown "for discharging every part of it." Applying that passage, with every word of which I agree, to this case, it means that it is quite clear on the authorities that once you put this particular evidence outside the category of "fresh evidence," the following things could not be attacked: the finding of desertion, and, so far as it is relevant, the question of custody. That finding was not sought to be attacked, so the question is academic. The finding of desertion and custody and the amount for the maintenance of the child were not in question at all on this summons as it was eventually dealt with. The whole question was: What amount should be awarded to the wife? Should that be varied?

Agreeing as I do with Hill J. that the cause which has to be shown must be cause relating to the particular issue, I am not, as I have already said, prepared to limit that to a question of figures only. Indeed exactly the contrary of that was indicated

(1) [1919] P. 75.

by Lord Hewart C.J. in the case of *Batchelor* v. *Smith* (1). It is not limited to evidence of means. Equally, I am not prepared to say that, speaking generally, evidence of the conduct of the party attacked, whether before or after the making of the order, is necessarily to be excluded. I think it may be very relevant on the question of amount. It is enough to say that in the section of the Judicature Act which regulates the jurisdiction for making maintenance orders in this Division the conduct of the parties is one of the things which is expressly mentioned, and it is really a commonplace that on this question of amount it is a matter which has to be taken into account. Having said that, I feel very strongly that a mere repetition of the identical evidence, or evidence of identical conduct, which was received before the order was originally made, and must necessarily have had its bearing not merely on the finding of desertion but on the amount to be awarded, cannot be put forward at a later date as cause for varying the amount. In my opinion there was no evidence which was receivable by the magistrate as cause for varying the amount or reducing it in the way he did. This is quite a different proposition from the proposition with which I have been dealing on the interpretation of the words " upon fresh evidence." That proposition prevents a man from bringing, on an issue which has been determined, evidence which was available to him before but which was not produced. The view that I take of this matter is simply this, that when evidence has been produced on which a certain result has been arrived at both on the merits and on the money, it is not open to the party to produce the same evidence again as cause for varying the amount of the monetary award. I am bound to say that I think that once the magistrate had come quite correctly to the view that this application to discharge was barred by the implication turning on the words " upon fresh evidence " in s. 7 of the Act of 1895, it would have been wiser to leave things as they then were instead of suggesting an amendment which, to put it at the lowest, imported a certain air of unreality into the proceedings.

In my opinion this appeal must be allowed. I only wish to add one thing. As I understand, there may be divorce proceedings. That has been indicated on both sides in the course of argument. We are dealing with nothing but the proper interpretation of this section, and must be taken to express no opinion one way or the other on the magistrate's finding, as it apparently was, that the wife had committed adultery.

(1) The Times, Jan. 12, 1935

1945

UNDERWOOD v. UNDERWOOD.

WALLINGTON J. I agree, if I may say so, with every word which has fallen from my Lord, and but for the importance of this matter, and some little confusion which has arisen in the minds of some in relation to it, I would not have felt it necessary to add one word; in the circumstances I would like to state the matter very briefly in my own words. Section 4 of the Summary Jurisdiction (Married Women) Act, 1895, specifies a number of grounds on which a married woman may apply for an order or orders against her husband. Section 5 specifies the order or orders that may be made on any such application. They are under letters (*a*), (*b*), (*c*) and (*d*). Paragraph (*c*) is the only one with which the court is concerned in this case —that is, an order for payment of money. Section 7 of the same Act provides that any order under this Act or the Acts within the schedule may be dealt with in the ways mentioned in s. 7. The words " any order or orders " in that section seem to me to be referring individually to the orders specified in s. 5 so that any order or orders that may be made in favour of the wife in any case may be dealt with as mentioned in s. 7. They need not all be : some of them may be : if one or more than one is affected then what I may call a composite order comes into existence ; it is convenient to call it an " order," but it is, in fact, a number of orders in one document. The money orders may be regarded as distinct, and in that case a non-cohabitation order or an order for custody, if it had been in the original order, would remain even though the " money " order " had been varied or discharged.

Then there is s. 30, sub-s. 3, of the Criminal Jurisdiction Administration Act, 1914. I need only say that the effect of it is limited to adding jurisdiction to revive an already discharged order, to the orders which can be made on an application under s. 7. Then s. 9 of the Money Payments (Justices Procedure) Act, 1935, eliminates the words " upon fresh evi- " dence " both where those words appear expressly or where they have been implied in s. 7 of the Act of 1895, so far and only so far as they relate to money payments. The result of it all seems to me to be that on a second application to the justices, that is to say, an application to vary or revoke an order, if the application relates to (*a*) or (*b*) of s. 5, an order can be made only on fresh evidence. If it relates to (*c*) in s. 5—that is, a money payment order—an order can be made without any fresh evidence on cause shown to the satisfaction of the court. That I understand to be the effect of the various sections.

1945

UNDERWOOD v. UNDERWOOD.

Wallington J.

With regard to this case, I agree with my Lord that the magistrate was perfectly right in holding that inasmuch as on the original application the issue raised by the husband by way of defence was, "My wife has committed adultery," and on the application to discharge or vary the order the husband's case was, "My wife has committed adultery," evidence available at the date of the earlier hearing that the wife had committed adultery would not be fresh evidence within the meaning of those words as they have been interpreted by the court in so many cases. With regard to the order that he made diminishing the amount of the payment, the question is whether there was cause shown for that order. It seems to me that to say: The original order was made despite a defence of adultery by the wife, but proof by the husband of what he failed to establish when the order was originally made will constitute "cause shown to the satisfaction "of the court" is incorrect. In my opinion that cannot be cause shown to the satisfaction of the court.

For these reasons in my opinion, as my Lord has said, the appeal must be allowed.

Appeal allowed.

Solicitors for wife: *C. V. Young & Cowper.*
Solicitor for husband: *J. C. Clifford Watts.*

V. J. M. S.

THE F. J. WOLFE.

C. A.

1945

Nov. 26, 27, 28, 29.

Scott, du Parcq and Morton L.JJ.

Shipping—Collision—Convoys meeting on crossing courses—Risk of Collision—Duties of single ships—Admiralty notice for guidance of mariners—Regulations for Preventing Collisions at Sea.

Where vessels which are units of different convoys are seen to be approaching each other on such courses as will involve risk of collision unless action is taken, it is the duty of each vessel to observe, so far as circumstances permit, the principles of good seamanship as laid down in the Regulations for Preventing Collisions at Sea, which are, in effect, the rules or principles of practical seamanship established by the experience of generations of seamen.

Decision of Pilcher J. [1945] P. 61, affirmed.

APPEAL from Pilcher J.

The plaintiff was the Attorney-General suing in respect of

C. A.
1945
THE F. J. WOLFE.

the loss of the steamship *Empire Soldier* of 4,539 tons gross, and 2,743 tons net register, which had been requisitioned by His Majesty's Government; the defendants, the Anglo American Oil Co., Ld., were the owners of the twin screw motor vessel *F. J. Wolfe* of 12,190 tons gross, and 6,569 tons net register.

On September 16, 1942, the vessels collided in the Atlantic Ocean, off Newfoundland, while sailing in separate convoys. The *Empire Soldier* sank in consequence of the damage she suffered.

The *Empire Soldier* was the leading ship in the third column from the port side of an eight-column convoy of over thirty ships. The *F. J. Wolfe* was the commodore ship in the port column of a convoy of four ships proceeding in two columns. The convoys were sailing on almost opposite courses which, if continued, would intersect at an angle of some 57 degrees. No navigation lights were being exhibited by the vessels in question. The *Empire Soldier* first sighted, during the hours of darkness, the *F. J. Wolfe's* convoy at a distance of about three miles, bearing on the starboard bow, and was, therefore, if the Collision Regulations applied, the "give-way" ship under art. 19. The *F. J. Wolfe* later observed the *Empire Soldier* on her port bow, and her corresponding duty under art. 20 of the Regulations would be to keep course and speed until it appeared that a collision could not be avoided by the action of the give-way vessel alone. Neither the *Empire Soldier* nor the *F. J. Wolfe* appreciated at first that the other was navigating in convoy. The *Empire Soldier* took no action to give way to the *F. J. Wolfe* until too late to avoid collision, and the action taken by the *F. J. Wolfe*, as the stand-on ship, when those on board saw that collision could not be avoided by the *Empire Soldier* alone, failed to avert it.

PILCHER J., pronounced the *Empire Soldier* alone to blame. He held that whilst the Collision Regulations as such did not apply they constituted a code recognized by maritime nations as well adapted for preventing collisions at sea, and the *Empire Soldier* should have obeyed the crossing rule as a matter of good seamanship.(1)

The plaintiff appealed.

Carpmael K.C. and *Owen Bateson K.C.* for the plaintiff. The learned judge was wrong in holding that the *Empire*

(1) [1945] P. 61.

C. A.
1945
THE F. J. WOLFE.

Soldier was alone to blame. Notices issued by the Admiralty to the masters of ships proceeding in convoy gave guidance where a single ship became involved with a convoy, but no provision was made to meet the situation when convoy met convoy and there was risk of collision between a unit of the one and a unit of the other. There was nothing to indicate to those on the *Empire Soldier* that the *F. J. Wolfe* was other than a single ship, and the *Empire Soldier* was right in obeying the rules laid down in the Notice to Mariners. There were only three other vessels in the *F. J. Wolfe's* convoy, which had dispersed, and the *F. J. Wolfe* ought to have taken similar action. She never appreciated that the *Empire Soldier* was one of a large convoy. That wrong assumption was a result of her bad look-out, because she admittedly did not sight the *Empire Soldier* as soon as she should have done. The *Empire Soldier* was wrongly regarded by the *F. J. Wolfe* as a single ship. But for her bad look-out the *F. J. Wolfe* would have acted very differently. It would have been bad seamanship for a ship of a small convoy, even though complying with the Collision Regulations, to stand on and weave her way through a large convoy.

Hayward K.C. and *Porges* for the defendants. The ordinary rules of navigation should be applied here. It is argued for the plaintiff that the units of a small convoy should give way to the units of a large convoy, but it is not suggested that a small convoy should give way to a large convoy.

[SCOTT L.J. How could a convoy extending for miles keep out of the way of another? One can only deal with the particular units to which the risk of collision applies. A mariner can only go by steps. He must deal with a difficulty as it arises.]

[DU PARCQ L.J. You cannot lay down a rule ex post facto.]

Where a single ship is required to take action, whether in convoy or not, to avoid risk of collision, the Collision Regulations must be taken as the guide, and, by art. 27, departure from those regulations is only permitted in order to avoid imminent danger. The duty to take action by the stand-on ship only arises when risk of collision might reasonably be said to exist. The *F.J. Wolfe*, as the stand-on ship took action to avoid the collision, which was the right and proper action, and not, in the circumstances, premature. [Counsel referred to Marsden on Collisions at Sea, 9th ed., at

C. A. 1945

THE F.J. WOLFE.

p. 377.] The decision of Pilcher J. was right in every respect and this appeal ought to be dismissed.

SCOTT L.J., after stating the facts, continued: This appeal has involved an interesting discussion as to the application of the crossing rule where a single ship finds itself involved in what I will call a foreign convoy, with the possible complication that that ship is herself a unit of another convoy. The appeal arises out of a collision in the North Atlantic, near Newfoundland, on September 16, 1942, at about 1.44 a.m. ship's time [4.44 a.m. G.M.T.] The ships were the *Empire Soldier* and the *F. J. Wolfe*, and the result of the collision was that the *Empire Soldier* sank shortly afterwards, together with a cargo of war stores, worth some 600,000*l*. The action was brought by the Attorney-General, the stores being the property of, and the ship, presumably, requisitioned by, His Majesty's Government. Pilcher J. held, in a carefully considered judgment, that the *Empire Soldier* was alone to blame. I agree so completely with his judgment that I should have been content to adopt it as my own, with only slight exegetic comments on one or two incidental sentences which may be slightly ambiguous. As, however, the case raises certain general questions of seamanship, if not also of law, as to the bearing on the Regulations for Preventing Collisions at Sea on the fact that one or both ships which collided were sailing in convoy, I will state the facts so far as material for the consideration of these questions. The judgment of Pilcher J., I think, covers them all.

[His Lordship then stated the facts and continued]: On the facts as found, Pilcher J. put to the Elder Brethren the following questions. "(*a*) Was the *Empire Soldier* justified, "as a matter of seamanship, in standing on until she was "between two and three cables distant from the *Wolfe*? "(*b*) Was the situation such when the *Wolfe* took action "that it could reasonably be anticipated by the *Wolfe* "that collision could not be avoided by the action of the "*Empire Soldier* alone? and (*c*) Could the *Empire Soldier* "have starboarded sufficiently to clear the *Wolfe* without "incurring risk of collision with the leader of the fourth "column?" The Elder Brethren answered those questions as follows: (*a*) "No"; (*b*) "Yes"; (*c*) "Yes."

Mr. Carpmael put forward a contention, which I do not think he really pressed very hard, that the mere fact that the

Empire Soldier was in convoy eliminated all obligations to observe the collision regulations either as regulations having a binding force, or as what I prefer to call principles of seamanship. In my view it is impossible to maintain that contention. I am alive to the warning contained in Admiralty Notice No. 7 of January 1, 1942, which, in effect, merely applied the recognized views which have been expressed in the courts about squadrons of warships and, during the recent war, about convoys, i.e., that the fact of a ship being in convoy is a relevant circumstance, and that it is desirable for a single ship, if possible, to avoid becoming mixed up with other ships in convoy. If a ship has become mixed up with a convoy in circumstances when it cannot be blamed for getting there, then, it seems to me, it is quite impossible to argue that the fact that the other ship is in convoy eliminates all necessity for considering the principles of seamanship as embodied in the Regulations for Preventing Collisions at Sea. Those rules represent the considered views of almost generations of seamen of many nations.

Mr. Carpmael's second argument was that assuming that r. 19 of the collision regulations, either "as such" or as a "principle of seamanship" applied in the circumstances of this case, the *F. J. Wolfe* as the stand-on vessel took action prematurely. His third contention was that if she did not act prematurely, when she did act she acted wrongly. I have no hesitation in saying that on his findings of fact the conclusions of the learned judge were right. The fundamental issue is as to the duty of crossing ships when the give-way ship is a member of a convoy. In my opinion, since the abolition in 1911 of the statutory presumption of fault where there had been a breach of a regulation, it makes, generally speaking, very little practical difference whether one says that the rules for prevention of collisions are directly operative "as such," or merely "as a guide for seamanship." If one of the ships is under a definite order from its commodore to take specific action, that is, of course, a relevant matter for consideration it is one of the circumstances that the navigator has to consider—but the principles of seamanship ought, in my view always to be borne in mind, whether one calls them "rules" or "principles." Their bearing on maritime duty and fault under the one aspect or the other is normally just the same. Every skilled and experienced navigator has the regulations—the crossing rule at any rate—deeply ingrained in his mind, and

C. A.
1945
THE F. J. WOLFE.
Scott L.J.

reacts to it just as a natural stimulus from the brain acts on muscles. It is automatic. This view has been strongly expressed to the court by our Assessors.

That being so, I think it is the end of this appeal, and I do not propose to discuss the cases, to which we have been referred, decided before 1911, when statutory presumption of fault was abolished, or those cases which have been decided since. We have considered the four cases which have been decided since 1911, namely, the *Gulf of Suez* (1), the *Otranto* (2), the *Heranger* (3) and the *Scottish Musician* (4). The cases which were decided before 1911 were *H.M.S. Sans Pareil* (5), the *Albano* (6), which was a decision of the Privy Council, and the *Etna* (7). When a breach of a collision regulation raised a statutory presumption of fault some different considerations may have applied, but I do not think it necessary to discuss either group of cases.

With regard to the Notice to Mariners, dated January 1, 1942, entitled: "Caution with regard to single ships approaching "squadrons or aircraft carriers" as to which it is agreed that the word "squadrons" should be treated as including "convoy:" article 4 provides: "In circumstances where "a single vessel has not taken early measures to keep out of the way of a squadron or aircraft carrier, the Regulations for "Preventing Collisions at Sea must be the guide." The phrase "must be the guide" does not seem to me to be in any way ambiguous, as Mr. Carpmael contends it is. I cannot imagine any direction more simple or more proper than that mariners should take the regulations as their guide, always bearing in mind the elasticity of arts. 27 and 29 of the regulations, to which reference was made in the pre-1911 decisions. Whether the regulations are to be regarded as quasi-statutory or as generally accepted principles of seamanship does not seem to me to make any practical difference on the facts of the present case. So far as my judgment in the present appeal is concerned, they may be either. The appeal, in my view, should be dismissed with costs.

DU PARCQ L.J. I agree, and I think with my Lord that Pilcher J.'s judgment cannot really be criticized at all

(1) [1921] P. 318.
(2) [1931] A. C. 194.
(3) [1939] A. C. 94.
(4) (1942) 72 L. L. Rep. 284.
(5) [1900] P. 267.
(6) [1907] A. C. 193.
(7) [1908] P. 269.

seriously. It has been minutely examined, as was quite right, and, no doubt, something may be said by way of criticism which has, at any rate, some apparent justification. But, taking the judgment as a whole, I, with my Lord, wish to express my respectful approval of it.

The principal question in this case, as it seems to me, is: What rules or principles ought to have governed the conduct of the ships in question, namely, the *Empire Soldier* and the *F. J. Wolfe*? The learned judge puts it in this way: "While the "collision regulations, as such, do not apply to the case under "consideration, yet they constitute a code recognized by all "maritime nations as a code well adapted for preventing "collisions at sea." (1) It does not in the end make much difference whether one says that the regulations, or, at any rate, the regulations as to crossing ships, apply with such modifications as are made necessary by the fact that ships are in convoy, or one says, with the learned judge, that the regulations as such do not apply but in fact, as a matter of seamanship, what are called the crossing rules must be considered to apply because, as my Lord has said, every mariner will properly expect every other mariner to be acting on them, and to be expecting that he himself will act on them in his turn. If the learned judge approached the matter in the right way, it seems to me that this becomes a question of fact involving, no doubt, when once you have decided all the particular facts of the case, the question: What did good seamanship demand? I say that that is a question of fact because that was strongly emphasized by Lord Wright in the case to which I referred during the argument, the *Heranger* (2). Lord Wright there said that precedents are in truth a very doubtful guide at best, and that a question of this kind—a question of good seamanship—is one of fact. On the following page he observes that, where there are no rules which apply to the particular facts, the decision what action should be taken depends, and can only depend, on the requirements of good seamanship and the application of the ordinary principles of the law of negligence. For myself, I should not profess to be able to say what the rules of good seamanship demand without expert assistance. Here we have remarkable unanimity of expert opinion. The Elder Brethren in the court below, answering questions put to them by the learned judge, clearly were of opinion that the duty of the

(1) [1945] P. 61, 67. (2) [1939] A. C. 94, 101, 102.

C. A.
1945
THE F. J. WOLFE.
du Parcq L.J.

Empire Soldier was to regard herself as the give-way ship in the circumstances of this case. The Assessors in this court have taken the same view, and as I understand the evidence of the officer who was responsible for the navigation of the *Empire Soldier*, he does not disagree. With regard to the criticism by Mr. Carpmael that the action taken by the *F. J. Wolfe* was premature, and that it was wrong, we are advised that on the facts found by the learned judge the action taken was neither premature nor wrong, and I agree with what my Lord has said on this point, and that the appeal should be dismissed.

MORTON L.J. I also agree and I desire only to add a few words on an argument of Mr. Carpmael which has not been referred to by either of my brethren. Plainly it did not suit counsel's case if the " crossing rule " ought to have been applied in the circumstances of the present case, and he sought to put forward another rule which, he contended, should have been applied when these two convoys were meeting. He suggested that, when a smaller convoy meets a larger convoy, either the smaller should keep out of the way of the larger or each individual ship in the smaller convoy should give way to each individual ship in the larger convoy if there is any risk of collision. There seems to me to be strong objection to the application of any such rule. In the first place, I am not quite sure what Mr. Carpmael suggests should be the test of the size of the convoy—whether it is to be the number of ships or the total tonnage of the ships. In the second place, I should have thought (and this is confirmed as a practical matter by one of our Nautical Assessors) that it would be often a matter of the greatest difficulty, when two convoys were approaching, for either convoy to be sure whether it was a larger or a smaller convoy than the other, especially under war conditions. The difficulty would exist, I am advised, whether the meeting of the convoys was during the night or by day. I agree that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for plaintiff: *The Treasury Solicitor.*
Solicitors for defendants: *Thomas Cooper & Co.*

H. G.

GORDON *v.* GORDON.

C. A.

1946
Jan. 18, 21.

Lord Greene M.R., du Parcq and Tucker L.JJ.

Contempt of court—Order requiring a specific act to be done by a specified time—Order known to person required to do the act—Service of order after expiration of time for compliance—Disobedience to order—Committal—Jurisdiction—Matrimonial Causes Rules, 1944 (*St. R. & O.* 1944, *No.* 389/*L.* 16), *r.* 62, *sub-r.* 2.

The petitioner having disobeyed an order of Barnard J. requiring him to hand the child of the marriage over to the respondent, Hodson J. on December 21, 1945, ordered him to hand the child over by 7 p.m. on that day. The order was not served until, 8 p.m. and the child was not handed over. On December 31, Lynskey J. made a committal order against the petitioner :—

Held, that committal and attachment were very technical, but since they affected the liberty of the subject, the rules must be strictly complied with. Those rules having statutory force, the court had no power to dispense with them. It was well settled that service of an order after the time limited for compliance would not found proceedings for committal or attachment. Assuming that the petitioner was aware of Hodson J.'s order in time to comply with it before 7 o'clock, that was still not sufficient to dispense with personal service, unless he was evading service, which it was impossible on the facts to infer. In the result this entirely contumacious person could not be rendered liable for his contempt.

Per curiam : (1.) Where an order requires a person to do a specific act it is important that the place as well as the time of performance should be precisely stated, so that the person required to obey the order may be in no doubt as to what he is required to do. Both the orders of Barnard J. and Hodson J. were defective in that they named no place for the child to be handed over.

(2.) In ordinary civil litigation committal or attachment is merely a form of execution available to a party who has obtained an order, and if he fails to comply with the rules the consequence is merely that he loses the benefit of that very effective means of enforcing his order. But where infants are involved the position is very different. The order is made in the interests of the infant, and it is the infant who suffers if the order cannot be enforced by reason of a mistake in procedure. It becomes doubly unfortunate if the party in default knows of the order, so that he would suffer no hardship from the omission of due service. It is desirable that some relaxation of the rules should be provided to meet such cases, but it does not exist at present.

In re Tuck [1906] 1 Ch. 692 (disapproving dictum of Cotton L.J. in *Hyde* v. *Hyde* (1888) 13 P. D. 166) followed.

APPEAL from Lynskey J.

The marriage of the husband petitioner and the respondent was dissolved by decree absolute on August 25, 1943, on the ground of the respondent's desertion. There was one child of

C. A.
1946
GORDON
v.
GORDON.

the marriage, Helen Frances Gordon, born on November 14, 1937. On November 29, 1943, an order was made in the Divorce Division giving the respondent the custody of the child, with provision for access by the petitioner.

On November 9, 1945, the petitioner, with whom the child was for the time being living at his house at Seal, near Sevenoaks, under the access provisions, took out a summons asking for rescission of the order giving custody to the respondent. On December 19, 1945, Barnard J. made an order that the petitioner should take proceedings in the Chancery Division forthwith to make the infant a ward of court, and he further ordered " that the petitioner do hand over the said child to the " respondent on Thursday, December 20, 1945, by 6 o'clock " p.m., the child to remain in the respondent's care and control " until further order, without prejudice to any application by " either party as to access or otherwise, and without prejudice " to any proceedings in the Chancery Division directed to be " taken as aforesaid, the respondent by her counsel undertaking " not to bring the child in contact with " a named person. The petitioner did not hand the child over in accordance with Barnard J.'s order, and on the following day, December 21, the respondent applied ex parte to Hodson J., who in the afternoon of that day ordered " that by or before 7 o'clock to-day the " petitioner do hand over to the respondent the child of the " marriage, namely, Helen Frances Gordon."

Though not instructed on the application, the petitioner's counsel was present in court, and the Court of Appeal dealt with the matter on the footing that the petitioner knew before 7 o'clock that the order had been made, and that the respondent was going down to Seal by motor-car to take possession of the child. The petitioner did not arrive home till 8 o'clock, and was then served with a copy of Hodson J.'s order, endorsed with a penal endorsement. The respondent was there, waiting to take the child, but the petitioner declined to hand her over.

On December 22, the respondent served on the petitioner notice of her intention to apply for his committal or attachment on the ground of his disobedience to the order of Hodson J. and on December 31, Lynskey J., as vacation judge, made an order committing the petitioner to prison, but directed it to lie in the office. The petitioner appealed, and the Court of Appeal expedited the hearing on condition that the child was handed over to the respondent forthwith, and that was done.

Astell Burt for the petitioner. It is well established that if an order requiring the doing of an act by a certain time is not served before that time has expired, committal or attachment cannot be given for disobedience. *Duffield* v. *Elwes* (1) was cited and followed in *Iberian Trust, Ld.* v. *Founders' Trust and Investment Co., Ld.* (2). The only exception is where the person required to obey the order is evading service. It is not enough that he may have been aware of the order, or even that he was present in court when it was made.

Alban Gordon for the respondent. The cases referred to for the petitioner can be matched by at least thirty in which it is stated that in exceptional cases a committal order may be made without personal service. [He referred to *Gordon* v. *Gordon* (3); *Favard* v. *Favard* (4); *In re Evans* (5); *Hyde* v. *Hyde* (6); *Rex* v. *Wigand* (7); *Incandescent Gas Co.* v. *Riemer* (8); *Ex parte Burgin* (9).] If *Duffield* v. *Elwes* (1) is an authority for the rule, *Ex parte Burgin* (9) is an authority for the exception. [Lord Greene M.R., referred to *In re Tuck* (10).] Here the court should infer that the petitioner was evading service.

Astell Burt in reply drew attention to the classification of contempt of court in Oswald on Contempt, 3rd ed., p. 33. The jurisdiction of the Court of Appeal is limited to cases where the process of contempt is sought in aid of a party. Ordinary or non-criminal contempt is distinguished from special or criminal contempt, the latter being interference with the due course of justice, "scandalizing the court or a judge" or contempts in facie curiæ. Ordinary contempt is wilful disobedience to an order of the court not in facie curiæ. This is a case of ordinary contempt, where an attempt is being made by a party who has obtained an order to enforce it by a process of execution. That party has failed to comply with the elementary rules governing the matter and is seeking to escape the consequences of that failure.

LORD GREENE M.R. (after stating the facts): There is one thing I want to say about the order of Barnard J., and the same observation applies to the later order of Hodson J. Neither

(1) (1840) 2 Beav. 268.
(2) [1932] 2 K. B. 87.
(3) [1903] P. 141.
(4) (1896) 75 L. T. 664.
(5) [1893] 1 Ch. 252.
(6) (1888) 13 P. D. 166.
(7) [1913] 2 K. B. 419.
(8) (1900) 17 R. P. C. 378.
(9) (1841) 1 Dowl. (N.S.) 292.
(10) [1906] 1 Ch. 692.

C. A.
1946
GORDON
v.
GORDON.
Lord Greene M.R.

order specifies the place where the child is to be handed over. It is of great importance, especially in cases where parties are likely to be in controversy and make difficulties, and perhaps to be contumacious and hostile, that orders which may have to be enforced by proceedings for committal or attachment should be of a perfectly precise nature, so that there can be no controversy about the duty which has to be performed under them. It would have been very much better if both orders had said that the child was to be handed over at a definite place, either at the petitioner's house, or elsewhere. Some question has been raised in this court as to where precisely the petitioner was to hand over the child. If the intention was that he should hand it over at his house, the order ought so to have specified. It did not do so. I will assume in favour of the respondent what I do not think for the moment is established, that the petitioner knew about this order before the time appointed, and that the understanding, of which he was well aware, was that delivery should be made to the respondent at the petitioner's house at Seal. Let me assume all that. What happened was that a copy of the order of Hodson J. was served on the petitioner who arrived at 8 o'clock, an hour after the time appointed for handing over the child. We were asked to infer from the fact that the petitioner did not arrive home until 8 o'clock, although, as it was assumed, he knew of the existence of this order in plenty of time, that he was evading service. That inference I must entirely decline to draw. It seems to me that the evidence relied on to support it is quite insufficient.

One thing stands out in this case with the utmost clearness. The petitioner made up his mind deliberately and with full knowledge of the possible consequences to defy the orders of the court. There was the order of Barnard J. That he deliberately defied. Whether he knew or did not know before 7 o'clock on December 21 that Hodson J. had made his order, he determined that he would not hand over the child at any time pursuant to that order. We were told that the child has been since made a ward of court. Cohen J. made an order that the child should go to a boarding school, and re-affirmed the order of Hodson J. for delivery of the child to the mother in time to enable it to go to school. When the application was made to this court to expedite the appeal it transpired that the petitioner was still defying all the orders of the court and was determined to keep the child. That was stated by his counsel

in court. When it appeared that the court would not be disposed to grant the indulgence of an immediate hearing of the appeal at a time when the appellant was proclaiming his intention to continue his conduct he thought better about it and undertook to hand over the child and to obey—I will not call it an order—the suggestion of this court that he must show his bona fides by bringing the child up and delivering it in the registrar's room that very evening. That was done. The mother had the child, and the child went to school. I only mention that in order to show that this petitioner has throughout been entirely contumacious and put himself in a position where, on the merits, the orders of the court called as loudly as in any case I have ever known for enforcement by the appropriate process.

Attachment and committal are very technical matters, and as orders for committal or attachment affect the liberty of the subject such rules as exist in relation to them must be strictly obeyed. However disobedient the party against whom the order is directed may be, unless the process of committal and attachment has been carried out strictly in accordance with the rules he is entitled to his freedom. I am not speaking now of contempts in the face of the court, but contempts by disobedience of an order for something to be done outside the court. In the present case the summons or notice of motion before Lynskey J. asked for committal or attachment. That is a common form nowadays, since both remedies are open in the case of disobedience to an order, whether a prohibitive order for which committal used to be the appropriate remedy, or an affirmative, positive order, for disobedience of which attachment was the remedy. Either remedy is now possible, but there is still a certain procedural difference, and, speaking quite generally, the procedure in the case of attachment is more technical than in the case of committal. Accordingly, when before Lynskey J. counsel was asked to elect which remedy he sought, feeling no doubt in difficulty with regard to attachment owing to non-compliance with the technical rules relating to attachment, he elected to ask for committal, and committal he obtained.

The only matter that we have heard argued is a purely technical matter, which is that the order of Hodson J. requiring delivery by 7 o'clock was not served until that time had elapsed, that is to say until 8 o'clock in the evening. The relevant rule in the Matrimonial Causes Rules, 1944, is r. 62, sub-r. 2 :

C. A.
1946
GORDON
v.
GORDON.
Lord Greene M.R.

" A decree or order requiring a person to do an act thereby " ordered shall state the time within which the act is to be " done, and the copy to be served upon the person required to " obey the same shall be endorsed with a notice in accordance " with form 13." That rule in the Divorce Division follows in substance, with some verbal modifications, the corresponding Rule of the Supreme Court, Or. 41, r. 5. That provides that : " Every judgment or order made in any cause or matter " requiring any person to do an act thereby ordered shall state " the time, or the time after service of the judgment or order, " within which the act is to be done." Then there is a provision for the endorsement of the penal memorandum. It is to be remembered that the process of enforcing orders in civil litigation made for the benefit of a party against the other party by committal or attachment is nothing more than a form of execution. It is that form of execution by which the successful litigant enforces his right against his unsuccessful opponent. If he fails to comply with the strict rules he is the sufferer because he has not succeeded in protecting or enforcing his right by this very effective means. When one comes to deal with the case of an infant the position is fundamentally different, because orders in respect of infants are not made for the benefit of any litigating party, such as a party to a divorce suit. They are made for the benefit of the infant and, therefore, one would expect to find that the rules relating to the enforcement of orders in the matter of infants by committal or attachment would recognize that fundamental difference. When the Court of Chancery is dealing with a ward of court it has certain powers, which I need not deal with here. We are dealing with a case where what is sought to be enforced is a custody order made in the Divorce Division. The enforcement of such an order is perhaps necessarily left to the interested party, the parent to whom custody has been given, and it may be that no serious inconvenience comes from that. But when it comes to enforcing an order made for the benefit of the infant at the instance of one of the parties to the litigation who may make a mistake in procedure and may not comply with all the rigours of the rules, the person who suffers is not merely the interested party, as it would be in ordinary litigation, but is the unfortunate infant, who does not get the protection of the enforcement of the order which has been made in its interest, merely because the parent who has taken upon himself or herself the burden of trying to enforce that order has made

some slip or been prevented by some accident from carrying out the strictness of the rules.

I cannot help thinking that if this case has shown one thing it has shown the desirability of making some special rules with regard to the enforcement by committal or attachment of orders made in respect of an infant who requires the protection of the court, and who ought not to be prejudiced by finding that an order, perhaps of an urgent and vital nature affecting its interests, has been flouted by the person against whom it is made, and that that person cannot be committed or attached owing to the fact that the party seeking to enforce the order has not complied with the rules. It becomes more manifestly unfortunate—I will not say absurd—when one finds that strict compliance with the rules as to service is required even in a case where the person against whom the order is made is perfectly well aware of it, is perhaps in court when it is made, and deliberately sets himself to flout it. In the case of ordinary litigation between parties the strictness of requiring service of the order is a thing one can understand, but why should an infant suffer by a strict rule of that kind, and why should the court's order in its favour for its protection be disregarded without remedy, when the parent against whom the order is made is perhaps sitting in court? I have said that in this case I am prepared to assume that the father knew all about Hodson J.'s order in time to comply with it by 7 o'clock, and if that assumption be correct it is unfortunate that owing to non-compliance with the rules of practice it will be impossible to enforce that order by proceedings for contempt.

The only question, therefore, which we find it necessary to consider, is whether or not the order was enforceable having regard to the fact that it was served after the time by which it should have been complied with. The essential importance of that time can, I think, be related to what I said earlier with regard to the place of delivery. To deliver a child to somebody else you must deliver it somewhere. If the person against whom the order is directed is left in any doubt as to where he is to deliver the child, the order is irregular. If he is to deliver a child at a particular place at a particular hour to a particular person, then he is entitled to be told and have it brought to his knowledge in time to enable him to take the necessary steps to do it before the time indicated. After that time is past he cannot be strictly said to be in contempt.

The principle that, where a definite time is mentioned in the

C. A.
1946
GORDON
v.
GORDON.
Lord Greene M.R.

order for doing something, service of the order after the expiration of that time is not sufficient to found proceedings for contempt is well established. I need not go into the authorities except to mention the latest, a decision of Luxmoore J. in *Iberian Trust, Ld.* v. *Founders' Trust and Investment Co., Ld.* (1), where he states the rule, speaking of the order in front of him: "I think it is quite plain from the decision in *Duffield* "v. *Elwes* (2) that that order could not be enforced by penal "proceedings, because there can be no default in compliance "with an order ordering something to be done within a certain "time when the order was not served until after the time within "which the act was to be done has expired. That again would "be a complete answer to the application for attachment in "this case."

In my opinion, service of the order in due time was necessary for the purpose of founding proceedings in contempt. It is a misfortune which may happen to a child, an infant, for whose benefit the order is made if, owing to some dilatoriness or accident, the person who has taken charge of serving the order serves it out of time. That may be all very well when the person on whom the order is to be served never knew of it, but it becomes unreasonable in a case where he knows of it and could perfectly well comply with it in time.

Mr. Gordon, on behalf of the respondent, did not attempt, and he could not have attempted, to argue that, assuming the rules have to be strictly construed and applied, the service would have been good. He directed his argument to a different contention altogether. He said that in the present case there was no necessity for service and he put that on two alternative grounds. First of all, he said that this was a case where we ought to infer that the appellant was evading service. I have already said that is an inference I am not prepared to draw. He then said, alternatively, it was sufficient that the appellant in fact knew of the order, and he invited us to assume, and as I have said I will for the purpose of the argument assume, that the appellant did know of the order. That, Mr. Gordon said, was sufficient, and accordingly the fact that the order was not served in time did not hurt him. In my opinion that argument cannot be accepted. Here is a rule of court which has statutory force. It does not provide for any exceptions. It is quite explicit. It requires certain things to be done, and this court has no power to dispense with the requirements of the rule.

(1) [1932] 2 K. B. 87, 96. (2) 2 Beav. 268.

Mr. Gordon referred us to some authorities which he claimed supported his view. The first one was, curiously enough, *Gordon* v. *Gordon* (1), but that was a case in which an order had been made giving the custody of the child to the father, the petitioner, and directing the mother to deliver the child up. There was litigation in an attempt to vary that order and an application was made to the court to enforce the order as to custody. The mother was ordered to give up the child to the petitioner. That order was disobeyed and later a motion was moved for a writ of attachment or for an order for committal upon affidavits stating that the mother had left the country with the child. The custody order apparently had never been served properly, but the court made an order for attachment and committal—which is rather curious—on the ground apparently that the child had been removed out of the jurisdiction. Different considerations apply in such a case. The report is a very short one and I can find in it no authority for any such right in the court as Mr. Gordon argues for to dispense with strict compliance with the rule as to service in cases where the person against whom the order is made in fact knows of it.

Mr. Gordon then referred to another case in this court, *Hyde* v. *Hyde* (2). It was a case of evasion of service, and this court held that personal service of the order was not necessary to give the court jurisdiction to issue a writ of sequestration, which was the form of execution sought in that case. It contains a dictum which has been adversely commented on in this court suggesting that the court can dispense with the necessity of service in a case where the party against whom the order is made in fact knows of it. The case in which that criticism was made was *In re Tuck* (3). That was a case where a trustee had disobeyed an order to pay money into court, the order not having been personally served upon him. He had been in court when it was made and actually initialled one of the briefs. In spite of that, it was held that personal service was required unless it was shown that he was evading service. The court consisted of Collins M.R. and Cozens-Hardy L.J. In the judgment of the court Cozens-Hardy L.J. said this: "The "learned judge held that the objection that the order had not "been served until after January 1 was not a good objection, "because the defendant was present in court when the order "was made, and therefore personal service was unnecessary. "In support of this view the learned judge referred to *Hyde* v.

(1) [1903] P. 141.
(2) 13 P. D. 166, 171.
(3) [1906] 1 Ch. 692, 695.

C. A.
1946
GORDON v. GORDON.
Lord Greene M.R.

" *Hyde* (1) where Cotton L.J. said: ' It is true that as a general " ' rule no order will be made for sequestration or attachment " ' unless it can be shown that there has been personal service " ' of the order disobeyed, but there are exceptions to that rule. " ' If it were proved, for instance, that the person was actually " ' in court at the time the order was made, service would be " ' unnecessary in order to obtain process for contempt, and " ' personal service is also dispensed with if it is shown that the " ' reason why there has been no personal service is that the " ' person to be served has evaded service '." Then Cozens-Hardy L.J. goes on: " The observation of Cotton L.J. upon " which the learned judge relied was not necessary for the " decision of the case in which it was made, but nevertheless it " is a clear dictum by Cotton L.J. and one which deserves " careful consideration. It was not suggested to us that " there was any reported case in which this dictum had been " acted upon, and it is not easy to understand on what ground " the cases where a defendant evaded service of an order of " which he had notice came to be discussed at all if the fact of " notice, apart from evasion, could be deemed sufficient to " dispense with service of the order." I need not read any more. It is quite clear that the proposition that knowledge of the order takes the place of service is negatived with the greatest emphasis and clearness and the very important distinction is brought out between an order directing the doing of an act and an injunction which restrains the doing of an act. I need not read more of that case. It is the most recent case in this court, and in my opinion we are bound to follow it. If I may respectfully say so, I cannot see how it ever came to be argued or suggested that the court has got some sort of inherent power to dispense with compliance with a perfectly clear rule of court requiring an order to be brought in a particularly formal way to a person's knowledge, merely because he knows of the order from a different source. The requirement of a penal endorsement confirms this view.

Those responsible for the rules in their wisdom have required this great degree of strictness in cases where the liberty of the subject is liable to be affected, and in my opinion the court has no dispensing power. I have already indicated my view as to the desirability of some relaxation of the strictness of the order in cases where the person for whose benefit the order is to be enforced is an infant and not a mere party to litigation. That

(1) 13 P. D. 166, 171.

will be a matter, no doubt, for consideration by those responsible for the rules. We cannot make rules, we cannot dispense with rules.

In the present case it is clear that the order was not properly served in time. In view of that, there was no such breach of the order as would justify proceedings in contempt, and the fact, which I am assuming, that the father knew all about the order in plenty of time does not justify us in any way in departing from the requirements of the rule.

I think I have dealt now with all the relevant aspects of this case. The other matters which were adumbrated were never fully argued and I say nothing about them. In the result this undoubtedly contumacious person succeeds in retaining his liberty, as he is entitled to do, owing to the fact that the order was not properly served. The appeal must be allowed.

DU PARCQ L.J. I agree that this appeal must be allowed and I agree with everything that has been said by my Lord. The case certainly presents features which are highly unsatisfactory. It is not satisfactory that a man who has stated, not by his own lips but in an affidavit sworn by one of his legal representatives, that he has no intention of obeying the orders of the court, of which he knew perfectly well at the time when that affidavit was sworn, should escape with impunity. I fully realize that no court must ever forget the importance of the liberty of the subject and the importance of the principle that in this country people are not to be imprisoned without good cause shown according to law. Liberty would never be preserved if the courts were to have one measure for people whom they think to be deserving and another measure for people whom they think to be undeserving. The law must be applied strictly. So far as the liberty of the subject is concerned, I am quite satisfied that on the facts of this case it would be impossible for us to do anything but to allow the appeal.

There is, of course, another matter of great importance, and that is that the orders of the court should be observed and that no litigant should be permitted to say that he feels strongly that the order is a wrong order and, therefore, he will not obey it. I do, however, derive some satisfaction from the fact that, as my Lord has pointed out, the difficulties which may arise under this rule may be removed as a result of this case. The importance of the present case, as my Lord has said, is due to the fact that we are dealing with the custody of a small child. The hearing of this appeal has been expedited. It was

C. A.
1946
GORDON
v.
GORDON.
du Parcq L.J.

expedited because we were dealing with the liberty of the subject. There was a stage when Mr. Astell Burt for the petitioner told us it would be unnecessary after all to ask that the appeal should be expedited because the respondent was willing, and her counsel agreed that she was willing, that the matter should stand over, because she had no desire to be vindictive and was not anxious that the petitioner should be sent to prison. Upon that this court took a course which very likely we should not have taken if the matter in dispute had merely been the detention of a chattel. As my Lord then said, expressing the view of the whole court, we did not think it proper to postpone the matter, because it did not rest with the parties to say whether mercy should be extended or not. It was not a question whether the respondent was vindictive or not. It was a question ultimately for the court whether it would be content that its orders should be defied with impunity. That I mention because it emphasizes the public importance of the matter.

In this case I am glad to think that no harm has been done to the child. I think one may say that the attitude of the respondent herself, for which no one would criticize her, shows that she does not feel that grave harm has been done. It is, of course, a remarkable fact that, although the mother had an order for custody of the child and the father only an order for access, he has succeeded in obtaining custody of the child for so long, but it has not been suggested by anybody that the child has suffered morally or otherwise in his hands. As I have said, good may come out of the case because provision may be made in future to prevent what may be—I do not use the word to suggest that technicalities are not of importance—a merely technical omission from having the result of assisting a person who is minded to be disobedient. It is very desirable (and I only say this in order to show that I entirely agree with what my Lord has said), that steps of that kind should be taken, because there may be cases where a child is in the custody of a parent so unfit to have that custody that it would be a disaster that that parent should be enabled to retain it for a moment after the order of the court has been made. I have no doubt that it is not beyond the wit of man to devise a rule or form of order which will make it impossible that that very undesirable result should ever follow. In the circumstances, though one cannot help feeling a slight regret that it should be so, I agree that the appeal must be allowed.

TUCKER L.J. I have come to the same conclusion, but with regret. In this case I think the affidavit sworn on behalf of the petitioner, which was used before Lynskey J. shows that the only proper inference to be drawn is that the petitioner at all times was well aware of the order that had been made and was at all times intending to disobey it. In those circumstances the question arises whether this court has any jurisdiction to dispense with the strict requirements of r. 62 of the Matrimonial Causes Rules, 1944. I think it is quite clear that no grounds have been established which would justify this court in effect in ignoring the provisions of that order or dispensing with its fulfilment. In this particular case, with a little more expedition perhaps, and possibly by the filing of some further evidence, it might have been possible to secure the punishment of this man for his contempt of the order of the court. But this case does show that there may be cases, not only cases concerning an infant in the Divorce Court but possibly cases in the King's Bench Division under the corresponding Or. 41, r. 5, where it is necessary in an urgent case for an order to be made which has got to be carried out at very short notice indeed. This case shows that where such an order has been made in cases of great urgency it may be impossible to draw up the order and to serve it on the person concerned before the time at which the order has to be carried out. Because of the existence of these two rules, r. 62 of the Matrimonial Causes Rules and Or. 41, r. 5, of the Rules of the Supreme Court, cases may arise where persons can deliberately spurn the order of the court knowing that it has been made. I agree that it would be very desirable that those concerned with these matters might consider whether or not some alteration in the rules is required. Speaking for myself, I should suggest that Or. 41, r. 5, might possibly also deserve reconsideration as well as r. 62 of the Matrimonial Causes Rules. I agree that this appeal should be allowed.

Appeal allowed.

Solicitors for petitioner: *Oscar Mason & Co.*
Solicitors for respondent: *S. Myers & Son.*

J. W. H.

1945
Dec. 20.

Jones J.

GREEN *v.* GREEN.

Divorce—Desertion—Maintenance order containing non-cohabitation clause—Order varied and clause deleted—Aggregation of periods of desertion prior to order and subsequent to deletion of clause—Matrimonial Causes Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 6, *sub-s.* 3.

The existence of a non-cohabitation clause in a maintenance order precludes any desertion during the period the clause remains in the order. Section 6, sub-s. 3 of the Matrimonial Causes Act, 1937, provides that a period of desertion preceding the order shall (provided the parties have not resumed cohabitation, and the order has been continuously in force since it was granted) be deemed to be a period of desertion immediately preceding the presentation of a petition for divorce. Where the period before the maintenance order was made is less than three years, it may be aggregated with any period elapsing after the non-cohabitation clause has been deleted from the order to provide a period of three years' desertion immediately preceding the presentation of the petition.

PETITION for divorce on the ground of desertion.

The petitioner and the respondent were married on October 2, 1920, and they lived together until October, 1927, when the respondent told the petitioner to leave the house. In August, 1927, the respondent had told the petitioner that he would not give her any more money for her maintenance and if she wanted any more money she would have to take the matter to court. A letter was written by the respondent's solicitors to the petitioner's father suggesting a separation agreement since the respondent was not prepared to continue living with the petitioner. Her father was in favour of the agreement but the petitioner did not desire a separation and refused to enter into an agreement.

In October, 1927, when the respondent told the petitioner to leave the house, she went to live with her parents, and thereafter she heard no more of the respondent and he made no attempts to ask her to resume their matrimonial life. On January 22nd, 1930, the petitioner took out a summons for maintenance on which the justices made an order, in which a non-cohabitation clause was inadvertently inserted. On January 7, 1944, the non-cohabitation clause was deleted and notice thereof served on the respondent. On February 12, 1945, the wife filed a petition for divorce on the ground of desertion.

1945

GREEN v. GREEN.

Acton Pile for the petitioner. If a non-cohabitation clause is inserted in a police court order, desertion cannot continue to run even if it had commenced before the order was made and the clause was inserted per incuriam: *Harriman* v. *Harriman* (1); but when the non-cohabitation clause is inserted in the order, without the knowledge of the complainant she is entitled to make an application for its deletion, and when it is deleted her position, so far as desertion is concerned, is restored to where it stood when the order was made *Mackenzie* v. *Mackenzie* (2). Had there been three years' desertion before this order was made, a decree could have been granted at once under the Matrimonial Causes Act, 1937, s. 6, sub-s. 3 (3); *Cohen* v. *Cohen* (4). Where the period of desertion prior to the order has not amounted to the full three years, any continued desertion after the deletion of the non-cohabitation clause ought to be added to the earlier desertion to make up the full three years, provided that the husband has notice of the application to delete. In this case the wife had been deserted from about October, 1927, until the police court order was made on January 22, 1930. The non-cohabitation clause was deleted on January 7, 1944, and notice thereof was served on the husband on January 21, 1944, and no offer to return was made by the husband. The petition was filed on February 12, 1945. Desertion must be presumed to have continued throughout, apart from the period when the non-cohabitation clause remained in the order. (*Sifton* v. *Sifton* (5).)

The respondent did not appear.

JONES J., having stated the facts continued: The petitioner says she had no desire for a non-cohabitation clause in the order and it would not appear there was any necessity for it, because she had not objected in any way up to then to living with her

(1) [1909] P. 123.

(2) [1940] P. 81, 88.

(3) Matrimonial Causes Act, 1937, s. 6, sub-s. 3: "For the "purposes of any such petition "for divorce, a period of desertion immediately preceding the "institution of proceedings for ". . . . an order under" [the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925] . . . . "shall, if the parties "have not resumed cohabitation "and the . . . . order has been "continuously in force since "the granting thereof, be deemed "immediately to precede the "presentation of the petition for "divorce."

(4) [1940] A. C. 631, 644.

(5) [1939] P. 221.

1945

GREEN
v.
GREEN.

Jones J.

husband; she had not alleged, for instance, persistent cruelty and asked to be protected from him; what she wanted, as I find, was to resume life with him; and therefore this paragraph that she be no longer bound to cohabit with her husband seems to be most unsuitable, and I have very little doubt it was inserted by mistake. But that does not make any difference, according to the decision of the Court of Appeal in the case of *Mackenzie* v. *Mackenzie* (1), as I read it. It appears to me to be laid down quite clearly that provided the clause appears in the order it is binding.

I think it might be possible to show that the minutes of the justices contained an order to a different effect, for the purpose of showing that this particular copy of the order was not correct, but that has not been done in this case, and, therefore, I feel bound to hold that during the period that this order was in force, that is to say, during the period during which the clause to which I have referred was effective, there was no desertion of the petitioner by the respondent. That period was from January, 1930, until January, 1944, when she made an application to the justices and asked them to vary the order by deleting the non-cohabitation clause, and that was done.

Mr. Acton Pile relies on s. 6, sub-s. 3 of the Matrimonial Causes Act, 1937, which I hold to mean this: that the period of desertion which occurred before this order was obtained can be used by the petitioner as if it had occurred immediately before the presentation of the petition. That period was a period of two years and two months, from October, 1927 to January, 1930. Since the non-cohabitation clause was removed from the order, which still remains in force, there has been a period of a year, during which I find that the respondent has continued to desert the petitioner. He was served with notice of the application to delete this clause, and, therefore, if he had wanted to do so, he could have made a suggestion to her about resuming their matrimonial life, but this he has not done.

In those circumstances, therefore, I have come to the conclusion that the right course is to add to that period of one year which occurred immediately before the presentation of this petition, the period of two years and two months which occurred before the application for the order in 1930. That makes a period of three years and two months, and I hold that that period of three years and two months is a period of three years immediately preceding the presentation of the petition.

(1) [1940] P. 81.

1945

GREEN v. GREEN.

As the parties have not resumed cohabitation, I find that the sub-section applies to this case. I am satisfied that otherwise the case is proved, and, therefore, I pronounce a decree nisi.

Decree nisi granted.

Solicitors for the petitioner: *W. W. Box & Co.*

I. G. R. M.

Considered. DUNN v. D. [1949] P. 98

EMANUEL *v.* EMANUEL.

Considered. COMBE v. COMBE [1951] 2 K. B. 215

1945

June 7; July 6.

Denning J.

Divorce — Collusion — Presumption of innocence — Burden of proof negativing collusion.

The respondent husband after filing an answer denying alleged cruelty induced the petitioner to sign a letter undertaking not to claim alimony if he withdrew his defence.

Over two months later, within a few days of the trial, the defence was withdrawn and the question arose whether it was withdrawn in fulfilment of a collusive agreement or independently :—

Held, that a suspicion of collusion counterbalances the provisional presumption of innocence and that the petitioner had not discharged the burden of proof cast on her of negativing collusion.

Churchman v. *Churchman* [1945] P. 44, followed.

WIFE'S UNDEFENDED PETITION for divorce on the ground of cruelty.

The parties were married in 1935, and in October, 1944, the wife filed a petition for divorce on the ground of cruelty which was answered by a denial in January, 1945. Two months later the husband induced the wife to sign a letter undertaking not to claim alimony if the defence was withdrawn. No notice was taken of a request by the petitioner's solicitor that this letter be returned, nor was the defence withdrawn until June, 1945, within a few days of the trial.

The husband would have had a defence on the merits if the case had been fought.

Geoffrey Howard for the wife.
Victor Russell for the husband.

Cur. adv. vult.

1945

EMANUEL v. EMANUEL.

DENNING J. read the following judgment.

This case is one of several I have tried recently which raise the questions what is collusion and on whom is the burden of proof in respect of it. I propose to state the principles as I understand them on these points before I deal with the particular facts of this case.

In order to secure the proper administration of the divorce law, the court requires that every petitioner must have received a real injury and genuinely seek relief, and that he shall deal with the court with the utmost good faith. He must disclose to the court every material fact, that is, every fact whether for or against him, which may influence the court in deciding to grant or refuse a divorce; and he must not bring or carry on the suit in collusion with the respondent, that is, he must not be a party to any arrangement which perverts or tends to pervert the course of justice. Divorce by mutual consent is not allowed. This does not mean that, after a matrimonial offence has been committed or is believed to have been committed, the parties may not discuss the problems created by it. The law favours reconciliation and permits separation agreements. It cannot prevent the parties from considering the remaining alternative of divorce. If reconciliation is impossible, there are many matters to be considered such as the future of the children, the house and furniture, and the provision of maintenance and necessaries for the wife. Such matters must be dealt with either by agreement or by the court. If a separation has actually occurred or become inevitable, the law permits the parties to make a separation agreement which makes provision for such matters, see *Fender* v. *Mildmay* (1). So also if one party has started divorce proceedings or has decided to start them, the law permits the parties to make arrangements about such matters so long as they are made in good faith and with reasonable cause.

Even before an innocent party decides on divorce he or she may be faced with a difficult position. Take the case of an innocent wife. If her guilty husband is desirous of divorce, he may provide evidence, offer maintenance and costs and generally do all he can to persuade her to bring proceedings. She cannot stop him; and it is not every wife who can be expected to disregard such conduct. It may convince her that divorce is the only remedy for the situation that he has created, so that she accedes to his wish, decides to start proceedings

(1) [1938] A. C. 1, 44.

and accepts his offer, but that by itself is not collusion, *Beattie* v. *Beattie* (1). If she stoops, however, to accept a bribe that is collusion, because the court cannot be sure that she genuinely seeks relief.

It is not lawful to buy or sell divorce or separation, *Jones* v. *Waite* (2). If a petitioner accepts a bribe, or extorts one, as an inducement to bring or carry on proceedings, or if he bribes a respondent not to defend, that is collusion. In bribery, as in extortion, innocence or guilt depends on whether the inducement is offered or sought with reasonable cause or not. The line may often be difficult to draw. The provision by a guilty husband of an allowance for his wife or of her costs may be merely the provision of necessaries to which she is entitled by law ; but if he pays her a large sum in cash it excites a suspicion that it is the price of his freedom. Similarly a husband who stipulates for an excessive sum as damages from the co-respondent raises the suspicion that it is the price he asks for giving his wife her freedom, *Thorne* v. *Motor Trade Association* (3). Conversely the fact that a wife does not claim maintenance, or costs, may be simply because she has means of her own : but if she forgoes or agrees to forgo her claims in return for the withdrawal by the husband of a defence on the merits, reasonable cause would be hard to find. The fact that a husband does not claim custody of children or damages gives rise to no suspicion : but if he agrees to forgo his children or damages in return for a promise not to defend the suit on its merits, that may be collusion as it was in *Churchward* v. *Churchward* (4). It is for these reasons that the court requires that all agreements for permanent maintenance, custody of children, damages or costs shall be disclosed to it at the hearing of the petition, no such agreements being valid without the sanction of the court, except those made after decree absolute.

Where there has been collusion both parties are concerned to conceal the real nature of the transaction and it is necessary to see where the burden of proof lies.

The subject was considered by the Court of Appeal in *Churchman* v. *Churchman* (5). The case related to connivance but the same principles apply to collusion. The statute puts on the petitioner the legal burden of proving that the petition is not presented or prosecuted in collusion with the respondent or

(1) [1938] P. 99.
(2) (1839) 5 Bing. (N. C.) 341.
(3) [1937] A. C. 797, 822.
(4) [1895] P. 7.
(5) [1945] P. 44, 50.

1945

EMANUEL v. EMANUEL.

Denning J.

either of the respondents. In order to discharge that burden the petitioner is entitled to rely in the first instance on the presumption of innocence. That, however, is a provisional presumption only, by which I mean that it is a presumption (like the presumption of testamentary capacity or the presumption of negligence in cases of res ipsa loquitur) from which the court may (not must) infer the fact in issue and which puts on the other side (when there is one) the provisional burden of calling evidence or taking the consequences which may not necessarily be adverse. It must be distinguished from a compelling presumption (like the presumption of legitimacy or the presumption in favour of the holder of a bill) from which the court must in law infer the fact in issue unless the contrary or some other fact is proved and which puts on the other side the legal burden of proving that fact. The presumption of innocence in divorce cases is not a compelling presumption which puts on the other side the burden of proving collusion. If circumstances appear which, whilst not proving collusion, lead to a reasonable suspicion of it, they may counterbalance the provisional presumption (just as a suspicion of incapacity or an explanation consistent with due care respectively may counterbalance the provisional presumptions to which I have referred) and thus may shift the provisional burden back again. These provisional burdens which arise during the case and may shift within an issue must be distinguished from the legal burden of proving the fact in issue which never shifts. Provisional presumptions and burdens are not so much propositions of law as propositions of ordinary good sense, as was pointed out by a strong Court of Common Pleas which included Willes J. in *Sutton* v. *Sadler* (1), by Brett L.J. in *Pickup* v. *Thames Insurance Co.* (2), and by du Parcq L.J. in *Easson* v. *L.N.E. Ry.* (3). They are not necessarily decisive of the case, as is well illustrated by *Woolmington's* case (4). The legal burden on the other hand expresses a proposition of law, and is, in the last resort, decisive. The statute in divorce cases puts on the petitioner the legal burden of proving a negative which, though unusual, is not unknown to the law. At the end of the case the court must be satisfied on the evidence that the petition is not presented or prosecuted in collusion with the respondent. It need not be satisfied beyond reasonable doubt. It is sufficient if the greater probability is that there was no collusion.

(1) (1857) 3 C. B. (N. S.) 87, 96.
(2) (1878) 3 Q. B. D. 594, 600.
(3) [1944] K. B. 421, 425.
(4) [1935] A. C. 462.

If the matter is evenly balanced, the legal burden comes into play and requires the court to say that it is not satisfied.

The critical point in the discussion is whether the presumption of innocence in these cases is provisional or compelling. In *Churchman's* case (1) the Court of Appeal considered the presumption against connivance which is the presumption of innocence applied to connivance. In one passage the court said: "The issue does not arise at all unless the circumstances "are such as to lead to a suspicion of connivance calling for "investigation. Once the issue has been raised it might well "be thought that, since in most cases of connivance, if not "necessarily in all, the facts, including the all-important fact "of his state of mind, are so especially in the knowledge of the "party himself, the burden of dispelling suspicion, once aroused, "was always on the party." That passage indicates that the presumption of innocence in these cases is provisional only: for a presumption which is counterbalanced by suspicion must be a provisional presumption: and the burden imposed by the special knowledge of a party must be a provisional burden for it does not supply the want of necessary evidence. In another passage, however, the court when dealing with connivance said: "The same strict proof is required in the "case of a matrimonial offence as is required in connexion with "criminal offences properly so called." That passage indicates that the presumption of innocence in these cases is compelling: for a presumption which can only be defeated by strict proof must be a compelling presumption: and the burden which it produces must be a legal burden. The solution of this apparent difference is I think to be found by remembering that the statutory legal burden is the same in undefended as in defended cases and in cases when the King's Proctor intervenes and when he does not. In undefended cases where the King's Proctor does not intervene, the court is under the same duty to inquire whether there has been collusion or connivance, but there is no one to allege or prove it either by pleading, calling witnesses, producing documents, or by cross-examining the petitioner. At most in these cases there may appear a suspicion of collusion or connivance, when counsel for the petitioner in duty bound discloses it, or when a chance question by the judge discovers it. To require the same strict proof as is required in connexion with criminal offences, that is, to require collusion or connivance to be established beyond reasonable doubt, would make the statutory legal burden of no effect and

(1) [1945] P. 44, 50.

1945

EMANUEL v. EMANUEL.

Denning J.

indeed reverse it. I come to the conclusion therefore that the presumption of innocence in these cases is provisional only and is counterbalanced by circumstances which lead to suspicion, and that thereupon the petitioner is left, as he began, with the legal burden of negativing collusion or connivance.

Both before and during the proceedings the solicitors were negotiating about the division of the furniture and effects, the occupation of the flat, the education of the child, the amount of alimony pendente lite, and various other items. On the principles I have stated, none of those negotiations amounted to collusion. They dealt with matters which had to be settled either by agreement or by the court and the various claims were considered in good faith on their merits. In February and March, 1945, the parties met on several occasions to discuss the question of the furniture. On one of these occasions the husband told the wife that he was only defending the case because of the alimony. The wife said that he need not worry about that, because she was not going to claim any. He was, however—I use her words—" the type of man who required " 100 per cent. guarantee," and he got her to write out at his dictation a letter in these terms : " I, Julia Emanuel swear " that if my husband Joseph I. Emanuel withdraws his defence " and my divorce goes through undefended I shall at no time " claim any alimony from him. Julia Emanuel." He told her that it was a gentleman's agreement. She said that the only thing she would expect him to do was to take care of the child. He told her that he would take the letter to his solicitor and if it did not do any good he would send it back by 5 p.m. the next day. He did not return it. She told her solicitor who wrote on March 15, 1945, to the husband's solicitor saying that the husband quite wrongly extracted the letter from the wife and that it ought to be returned to them. It was not returned, nor was the defence withdrawn at that time. The case proceeded as a defended case. The husband filed an affidavit of documents which included the letter. The case was fixed for June 7, but a few days before, the husband's solicitor telephoned the wife's solicitor saying that he was no longer going to defend the case. The case was heard by me on June 7 when counsel very properly at once drew my attention to the letter, but submitted that, as it was not acted on before the wife's solicitor asked for it back and the case went on as a defended case for another two and a half months, the proceedings were not tainted by collusion. A petition cannot be said to be presented

or prosecuted in collusion with the respondent if all that has happened is that there have been collusive negotiations, so long as they have wholly broken down and have not affected the course of justice at all; but the difficulty I found in this case was that I was left in doubt whether the collusive understanding affected the proceedings: for in the absence of evidence by the husband I was unable to say whether he withdrew his defence in reliance on the promise contained in the letter (which he may still consider to be binding according to his notion of honour though not in law) or independently of it.

My suspicions were increased when I heard the evidence on the charge of cruelty. The petitioner gave evidence of a number of incidents throughout the married life but the only corroboration was of some incidents shortly before she left her husband in September, 1944. It became clear in the course of her evidence, however, that by that time she had formed an attachment for another man, and that these last incidents occurred when the husband found out about it and might have been provoked by it. In addition the petitioner's counsel very properly handed in to the court a copy of the correspondence disclosed by the respondent which showed that she was writing affectionate letters to him until August 24, 1944, and that when she was about to leave him she drafted a letter thanking him for all his "wonderful kindness, help and advice." In these circumstances it seemed to me that this might be one of those familiar cases where the wife had formed an attachment for another man and, in order to excuse herself and get her freedom, had delved into the past for incidents to support a charge of cruelty. At all events, it was a case where there was a defence on the merits, which I can well understand that the husband would seek to sustain, if he thought that his wife would claim permanent maintenance.

Applying the principles I have stated the case raises to my mind a suspicion of collusion which counterbalances the provisional presumption of innocence. Now at the end of the case I have on all the evidence to say whether I am satisfied that the petition is not prosecuted in collusion with the respondent. I am not satisfied and on that ground I dismiss the petition.

Petition dismissed.

Solicitors for wife: *W. P. Bennett & Co.*

Solicitors for husband: *Tarlo Lyons & Co.*

V. J. M. S.

C. A.

1946

Jan. 28, 29, 30.

Lord Greene M.R., Morton and Bucknill L.JJ.

BAINDAIL (OTHERWISE LAWSON) *v.* BAINDAIL.

Nullity of marriage—Hindu marriage—Subsequent English marriage—Recognition of Hindu marriage—English marriage a nullity.

The respondent while domiciled in India married a Hindu woman according to Hindu rites and that marriage was still subsisting when he went through the ceremony of marriage with an English woman. The English woman petitioned for a decree of nullity of her marriage after she had become aware of the Hindu marriage :—

Held, that, notwithstanding its polygamous nature, the Hindu marriage gave the respondent the status of a married man according to the law of his domicile and therefore that his pretended marriage with the petitioner was null and void.

Decision of Barnard J., following his previous decision in *Srini Vasan* v. *Srini Vasan*, ante p. 67, affirmed.

APPEAL from Barnard J.

On May 1, 1928, the respondent, while domiciled in India, married an Indian woman according to Hindu rites in the United Provinces, India. This marriage was a polygamous marriage by the customs and laws of the Hindu race. On May 5, 1939, on which date the respondent's Indian wife was still living, the petitioner went through the ceremony of marriage with the respondent at the registry office in Holborn. They lived and cohabited at various places and there was one child, a daughter born on February 22, 1940. The petitioner and the respondent were still living in England, on May 20, 1944, when the petitioner, having become aware of the Indian marriage, petitioned for a decree that the marriage in fact (but illegally) celebrated between her and the respondent was null and void and that she might have the custody of the child. The petitioner had found an invitation to the Hindu marriage and Dr. Nissim gave expert evidence that any ceremony performed according to the terms of that invitation would be a valid Hindu marriage and would be recognized as a valid marriage in the courts of British India.

BARNARD J. said that the facts were on all fours with those in *Srini Vasan* v. *Srini Vasan* (1). It had been sought to distinguish it on the ground that the respondent was when he went through the ceremony of marriage with the petitioner and still was domiciled in England. He was very doubtful whether that was so as it required a good deal of evidence to displace the domicile of origin which was British India. But he

(1) Ante p. 67.

did not think it was of the slightest materiality whether the respondent was domiciled in England or British India. He relied on and would follow his judgment in *Srini Vasan* v. *Srini Vasan* (1) and make a decree nisi of nullity. The respondent appealed.

Pritt K.C. and *Landau* for the respondent. The Hindu marriage was a polygamous marriage and, as such, it is not recognized in English law so as to render the later English marriage invalid. The essential qualities of marriage in England require that there shall be no subsisting marriage of either party: Rayden on Divorce, 4th ed., p. 39. That need is satisfied. Barnard J.'s decision in *Srini Vasan* v. *Srini Vasan* (1) which he has now followed, was wrongly decided. English law recognizes a polygamous marriage for some persons but not so as to prevent an English monogamous marriage: *Hyde* v. *Hyde* (2) where Lord Penzance said as regards a polygamous marriage that the court could not entertain a matrimonial suit in respect of such a union; *In re Bethell* (3); *Brinkley* v. *Attorney-General* (4); *Harvey* v. *Farnie* (5). In *R.* v. *Naguib* (6) Avory J.'s judgment indicates that marriage in England is valid in spite of a Mahommedan marriage in Egypt: see also *R.* v. *Hammersmith Superintendent Registrar of Marriages* (7). While there is no directly conclusive authority in favour of this appeal, the tenor of the relevant cases is in the direction of establishing that the English courts will disregard a polygamous marriage. Here then there is nothing to make the marriage in this country null and void. The *Sinha Peerage Claim* (8) is exceptional. It related to a claim by the son of the first Lord Sinha born of a Hindu marriage to the succession to the peerage. In allowing the claim Lord Maugham L.C. relied on the fact that the first lord and his wife joined a few years after the marriage a sect which only recognized monogamous marriages. Further the only question for the Committee of Privileges was whether the claimant was the legal offspring and heir of his father.

[LORD GREENE M.R. The view there was that a Hindu marriage was valid in our courts.] Undoubtedly Lord Maugham

(1) Ante p. 67.
(2) (1866) L. R. 1. P. & D. 130.
(3) (1888) 38 Ch. D. 220.
(4) (1890) 15 P. D. 76.
(5) (1880) 6 P. D. 35, 53.
(6) [1917] 1 K. B. 359.
(7) Ibid. 634.
(8) Journals of the House of Lords, 1939, vol. 171, p. 350.

C. A.
1946
BAINDAIL (OTHERWISE LAWSON) v. BAINDAIL.

recognized this for some purposes but that does not involve the recognition of the Hindu marriage for the present purpose. The courts will not deal with any marriage that is not monogamous.

Slade K.C. and *Colin Duncan* for the petitioner. (1.) By the law of England, the validity of a monogamous marriage contracted in this country between a man domiciled abroad and a woman, domiciled here, is determined by (*a*) the status, and (*b*) the capacity to marry of each of the two parties. (2.) Generally speaking, status is determined by the personal law (that is, in England the lex domicilii). That is the only law governing status. Here the status of the respondent is that of a married man under Indian law and he was therefore precluded from going through a monogamous marriage in this country, although he could have entered into a further marriage polygamously in India. Status must be distinguished from capacity, for the authorities differ as to whether it is the lex loci contractus or the lex domicilii that applies in regard to capacity: see *Chetti* v. *Chetti* (1), *Peal* v. *Peal* (2) and *In re Bozzelli's Settlement* (3) which have regard to the lex loci contractus and *Sottomayor* v. *De Barros* (4) and *Ogden* v. *Ogden* (5) where the lex domicilii is looked to.

Granted that English law prohibits a man already married from marrying again, the question whether he is already married depends on the law of the domicile. Although a Hindu marriage is potentially polygamous, it is recognized by the law of British India. The respondent was therefore a married man when he sought to enter into the English marriage and that he could not do. This is entirely a matter of status and must be distinguished from questions of capacity: see Dr. Allen's article "status and capacity" in 46 Law Quarterly Review, pp. 277, 293, 309 and 310. It must be taken as well settled that status is determined by the personal law: *Salvesen* v. *Administrator of Austrian Property* (6); *Harvey* v. *Farnie* (7); *In re Goodman's Trusts* (8). In the *Sinha Peerage* case (9) Lord Maugham L.C. definitely held that the Hindu marriage of the first Lord Sinha must be recognized because it was valid according to the law of the domicile. The decree of the

(1) [1909] P. 67.
(2) [1931] P. 97.
(3) [1902] 1 Ch. 751.
(4) (1877) 3 P. D. 1.
(5) [1908] P. 46.
(6) [1927] A. C. 641.
(7) 6 P. D. 35.
(8) (1881) 17 Ch. D. 266.
(9) Journals of the House of Lords, 1939, vol. 171, p. 350.

Committee of Privileges was based on the fact that English law recognized a potentially polygamous marriage because it was recognized by the law of British India. [They also referred to *Nachimson* v. *Nachimson* (1).]

Pritt K.C. replied.

LORD GREENE M.R., after stating the facts, continued: The point raised by the appeal is a very short one. It was said that for the purposes of a claim to a decree of nullity the existence of the Hindu marriage must be disregarded by the courts of this country with the consequence that on May 5, 1939, the respondent was an unmarried man and was therefore not debarred by any existing union from marrying the petitioner. In support of that proposition a number of observations in decided cases have been cited. But it is to be observed that in no one of those cases was the question to which the court was addressing its observations in any way similar to the present question; it is not, in my opinion, legitimate to take those observations from their context and apply them to what is essentially a different question. I do not propose to go through all the cases cited to us but I will take what I think has been properly described as the high-water mark, the well-known decision of Lord Penzance in *Hyde* v. *Hyde* (2). The headnote starts with this general proposition: "Marriage as understood in Christendom is the voluntary union "for life of one man and one woman, to the exclusion of all "others." But that, of course, does not enable any general answer to be given to the question: "What is to be understood "by 'marriage' for the purpose of the various branches of "English law in which the question of marriage is relevant?" For the purpose of enforcing the rights of marriage, or for the purpose of dissolving a marriage it has always been accepted as the case, following Lord Penzance's decision, that the courts of this country exercising jurisdiction in matrimonial affairs do not and cannot give effect to, or dissolve, marriages which are not monogamous marriages. The word "marriage" in the Matrimonial Causes Act, has to be construed for the purpose of ascertaining what the jurisdiction of the English courts is in these matters. The reasons are that the powers conferred on the courts for enforcing or dissolving a marriage tie are not adapted to any form of union between a man and a woman save a monogamous union. If a man by the law of his domicile is

(1) [1930] P. 85, 217. (2) L. R. 1 P. & D. 130.

C. A.

1946

BAINDAIL (OTHERWISE LAWSON) v. BAINDAIL.

Lord Greene M.R.

entitled to have four wives and then becomes domiciled in this country and wishes to be divorced here, nice questions would necessarily arise as to whether in consorting with the other wives he had been guilty of adultery and various questions of that kind. At any rate, rightly or wrongly, the courts have refused to regard a polygamous marriage as one which entitles the parties to come for matrimonial relief to the courts of this country. *Hyde* v. *Hyde* (1) was a case where two parties were Mormons and had married at a time when polygamy was recognized by the Mormon State and the question arose whether the husband was entitled to obtain a decree of divorce here. It was held that the Mormon marriage could not be regarded as a marriage for the purpose of asking the court to grant a decree of dissolution. Lord Penzance says this: "But I "expressed at the hearing a strong doubt whether the union of "man and woman as practised and adopted among the Mor- "mons was really a marriage in the sense understood in this, "the matrimonial court of England, and whether persons so "united could be considered 'husband' and 'wife' in the sense "in which these words must be interpreted in the Divorce Act. "Further reflection has confirmed this doubt, and has satisfied "me that this court cannot properly exercise any jurisdiction "over such unions." It is to be noted that Lord Penzance was there posing the question as a question arising on the construction of the Divorce Act. At the end of his judgment he says: "In conformity with these views the court must reject "the prayer of this petition, but I may take the occasion of here "observing that this decision is confined to that object. This "court does not profess to decide upon the rights of succession "or legitimacy which it might be proper to accord to the "issue of the polygamous unions, nor upon the rights or "obligations in relation to third persons which people living "under the sanction of such unions may have created for "themselves. All that is intended to be here decided is that as "between each other they are not entitled to the remedies, the "adjudication, or the relief of the matrimonial law of England." Lord Penzance quite clearly saw how undesirable it would be to attempt to lay down any comprehensive rule as to the manner in which a polygamous marriage ought to be regarded by the courts of this country for purposes different from that with which he was immediately concerned. I do not feel myself bound by anything said in *Hyde* v. *Hyde* (1) or any of the other

(1) L. R. 1 P. & D. 130.

cases on which reliance was placed in this connexion to hold that, for the purposes of the present petition, the court is bound, or ought, to disregard the existence of the Hindu marriage.

The problem, as it seems to me, requires to be approached de novo and from quite a different angle; that was the view which the learned judge took and, if I may respectfully say so, I entirely agree with the decision to which he came. The question as it presents itself to my mind is simply this: On May 5, 1939, when the respondent took the petitioner to the registry office was he, or was he not, a married man so as to be incapable of entering into another legitimate union? The proposition I think would not be disputed that in general the status of a person depends on his personal law, which is the law of his domicile. By the law of the respondent's domicile at the time of his Hindu marriage he unquestionably acquired the status of a married man according to Hindu law; he was married for all the purposes of Hindu law, and he had imposed upon him the rights and obligations which that status confers under that law. That status he never lost. Nothing that happened afterwards, save the dissolution of the marriage, if it be possible according to Hindu law, could deprive him of the status of a married man which he acquired under Hindu law at the time of his Hindu marriage; he was therefore a married man on May 5, 1939, according to Hindu law. Did that circumstance prevent him from entering into a valid marriage in this country? It is said that it did not because, whatever Hindu law may say and whatever his position may be in India, this country will not recognize the validity of the Hindu marriage. We are not considering in this case the question of construction of any words such as "marriage," "husband," "wife," and so forth in the Divorce Acts. We are considering whether, according to what would have been the old ecclesiastical law, the existence of the Hindu marriage formed a bar. For the purpose of that consideration, what was his status on May 5, 1939? Unquestionably, as I have said, it was that of a married man. Will that status be recognized in this country? English law certainly does not refuse all recognition of that status. For many purposes, quite obviously, the status would have to be recognized. If a Hindu domiciled in India died intestate in England leaving personal property in this country, the succession to the personal property would be governed by the law of his domicile; and in applying the law of his domicile effect would have to be given to the rights of any children of the Hindu marriage and of his Hindu widow,

C. A. 1946

BAINDAIL (OTHERWISE LAWSON) v. BAINDAIL.

Lord Greene M.R.

and for that purpose the courts of this country would be bound to recognize the validity of a Hindu marriage so far as it bears on the title to personal property left by an intestate here; one can think of other cases.

Lord Maugham L.C., who delivered the leading opinion of the Committee of Privileges in *Lord Sinha's* case (1) said this: "On "the other hand it cannot, I think, be doubted now, notwith- "standing some earlier dicta by eminent judges, that a Hindu "marriage between persons domiciled in India is recognized in "our courts, that issue are regarded as legitimate and that such "issue can succeed to property, with the possible exception to "which I will refer later"; that was the well-known exception of real estate. We have not been referred to the cases, if any, to which the learned Lord Chancellor was referring, and, in fact, I do not know of any English cases; there are cases no doubt in the Privy Council, but whether there are any purely English cases I do not know. But I do get assistance from that paragraph, quite apart from the question of authorities, as showing the way in which these problems were striking a great master of the law, and one particularly familiar with problem of private international law, If he was not asserting that the law had been settled by decisions of the English courts, he was at least expressing his own opinion and to that I would pay the greatest respect. But quite apart from that, it seems to me that the matter rests in this way: the courts of this country do for some purposes give effect to the law of the domicile as affixing or imposing a particular status on a given person. It would be wrong to say that for all purposes the law of the domicile is necessarily conclusive as to capacity arising from status. There are some things which the courts of this country will not allow a person in this country to do whatever status with its consequential capacity or incapacity the law of his domicile may give him. The case of slavery, of course, is an obvious case. The status of slavery would not be recognized here, and a variety of other things involved in status will not be recognized here. In the case of infants where different countries have different laws, it certainly is the view of high authority here that capacity to enter in England into an ordinary commercial contract is determined not by the law of the domicile but by the lex loci. I refer to the illustrations in order to show that there cannot be any hard and fast rule relating to the application of the law of the domicile as determining status and capacity for the purpose of transactions in this country.

(1) Journals of the House of Lords, 1939, vol. 171, p. 350.

The practical question in this case appears to be: Will the courts of this country, in deciding upon the validity of this English marriage, give effect to the status possessed by the respondent? That question we have to decide with due regard to common sense and some attention to reasonable policy. We are not fettered by any concluded decision on the matter. The learned judge set out in a striking manner some of the consequences which would flow from disregarding the Hindu marriage for present purposes. I think it is certainly a matter to bear in mind that the prospect of an English court saying that it will not regard the status of marriage conferred by a Hindu ceremony would be a curious one when very little more than a mile away the Privy Council might be sitting and coming to a precisely opposite conclusion as to the validity of such a marriage on an Indian appeal. I do not think we can disregard that circumstance. We have to apply the law in a state of affairs in which this question of the validity of Hindu marriages is necessarily of very great practical importance in the everyday running of our Commonwealth and Empire.

If the marriage with the petitioner was a valid marriage it would have this consequence: that she is entitled to the consortium of her husband to the exclusion of any other woman, that he is entitled to the consortium of his wife, and that she is bound according to our notions of law to live with him provided he gives her a suitable home. If he decided to go back to India it would be her duty as a wife to follow him to the home that he would provide. Assume that this takes place. Directly they land in India by the law of India he is a man married to the Indian lady, and assuming as I think we are bound to assume that Hindu law would be the same in this respect as English law, that Hindu lady is his lawful wife in India and as such would be entitled to his consortium, he would be entitled to insist that she should live with him and she would be entitled to insist that he should provide a home for her. The position therefore would be that this English lady would find herself compelled in India either to leave her husband or to share him with his Indian wife. What the position would be with regard to divorce in India I do not know, but if he had an Indian domicile she apparently could not divorce him in England. Whether or not she could divorce him in India because in India he was associating with a woman who under Indian law was his lawful wife I do not know and I do not stop to inquire. Is it right that the courts of this country should

C. A.

1946

BAINDAIL (OTHERWISE LAWSON) v. BAINDAIL.

Lord Greene M.R.

give effect to a ceremony of marriage, the result of which would be to put the petitioner into such a position? It seems to me that effect must be given to common sense and decency and that on a question which is not covered by authority considerations of that kind must carry very great weight. On principle it seems to me that the courts are for this purpose bound to recognize the Indian marriage as a valid marriage and an effective bar to any subsequent marriage in this country.

Those are the short grounds on which I think this appeal should be decided. If we have not thought it necessary to reserve judgment in order to study more fully the cases which have been cited it is not that we have failed to appreciate them, but because at any rate so far as I am concerned I do not find it necessary to examine them very closely. The opinion which I have formed relates and relates solely to the facts of the present case which are connected with the validity of the English marriage in the circumstances of this case. I must not be taken as suggesting that for every purpose and in every context an Indian marriage such as this would be regarded as a valid marriage in this country. Mr. Pritt in his reply drew an alarming picture of the effect of our decision on the law of bigamy if we were to decide against him. I think it right therefore to say that so far as I am concerned nothing that I have said must be taken as having the slightest bearing on the law of bigamy. On the question of whether a person is "married" within the meaning of the statute (which is a criminal statute) when he has entered into a Hindu marriage in India I am not going to express any opinion whatever. It seems to me a different question in which other considerations may well come into play. I hope sincerely that nobody will endeavour to spell out of what I have said anything to cover such a question. In the result the appeal must be dismissed.

MORTON L.J. Agreeing as I do with the view of the Master of the Rolls that this appeal must be dismissed on the short ground that he has stated I do not think that I can usefully add anything.

BUCKNILL L.J. I agree.

Appeal dismissed.

Solicitors: *S. L. Polak & Co.; Haslewood, Hare & Co., for W. H. Hadfield, Farnham.*

H. C. G.

SPAWFORTH *v.* SPAWFORTH.

1946
Jan. 23.
Hodson J.

Divorce—Petition—Supplemental petition—Application for leave to file supplemental petition—Desertion—Three years' desertion immediately preceding the presentatiom of the supplemental petition but not preceding petition—Whether supplemental petition part of original petition—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 57), *s.* 2.

A supplemental petition is part of or an amendment to the original petition.

Where the petitioner could not prove three years' desertion by the respondent immediately preceding the presentation of the petition and asked for leave to file a supplemental petition, immediately preceding which three years' desertion could be established :—

Held, that a supplemental petition would be merely part of or an amendment to the original petition, and would not cure the failure to prove three years' desertion immediately preceding the presentation of the petition as required by s. 2 of the Matrimonial Causes Act, 1937, and that the grant of a decree nisi must be refused.

Chapman v. *Chapman* [1938] P. 93 followed; *Howard-Williams* v. *Howard-Williams* [1944] P. 85 dissented from.

WIFE'S petition for divorce on the ground of desertion.

The parties were married on May 18, 1940, they lived together at various places, but never had any permanent home. There was one child of the marriage, the paternity of which was in dispute. The petitioner by her petition of January 8, 1945, sought a divorce on the ground of desertion, alleging desertion from October, 1941. The parties had, however, associated within the three years preceding the presentation of the petition, and leave was sought to file a supplemental petition, dated January 22, 1946, alleging desertion from August 23, 1942, when the respondent, who was in the army, wrote to her saying that he hoped another man would give her the happiness she wanted and that after the war she would give him a divorce.

The respondent denied the desertion, and asked for a divorce by his answer on the ground of the petitioner's adultery with a man unknown.

Merrylees for the petitioner. The petitioner has established three years' desertion immediately preceding the presentation of

1946

SPAWFORTH v. SPAWFORTH.

the supplemental petition, although not three years' desertion immediately preceding the original petition ; on the authority of *Howard-Williams* v. *Howard-Williams* (1) the petitioner is entitled to a decree nisi. In that case it was held that the supplemental petition was equivalent to the petition and a decree was granted notwithstanding the fact that the three years' desertion only dated from the supplemental petition. *Chapman* v. *Chapman* (2) was a case in answer and further answer (not petition and supplemental petition), and begged the question because leave was given to the respondent to file a petition and consolidate the suits. *Sandler* v. *Sandler* (3) is distinguishable from the case of *Howard-Williams* (1), the former case was only dealing with the aspect of collusion, and decided that the taint of collusion in the petition affected a supplemental petition since it went to the root of the case ; but it had nothing to do with the period of desertion required by s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, as replaced by s. 2 of the Matrimonial Causes Act, 1937.

Roland Adams for the respondent. The decision in *Chapman* v. *Chapman* (2) was right and should be followed. In that case a further answer being supplemental to the original answer, was held to be part of the original answer, and its effective date was held to be date of the original answer : see also *Sandler* v. *Sandler* (3). For the purposes of the present case there is no difference between a supplemental petition and a supplemental answer. The effective date of a supplemental petition for the purposes of s. 176 (*b*) of the Supreme Court of Judicature (Consolidation) Act, 1925, as replaced by s. 2 of the Matrimonial Causes Act, 1937, is the date of the petition, of which the supplemental petition is a part. If the decision in *Howard-Williams* v. *Howard-Williams* (1) were correct, and it is submitted that it is not correct, it would be possible for a petitioner to commence proceedings upon the ground of desertion for three years immediately preceding the presentation of the petition long before it could be supported by the necessary evidence as to the duration of the desertion (and a wife might thereby obtain considerable sums by way of alimony pending suit), and reliance would be placed on putting the matter right subsequently by presenting a supplemental petition when the full period of three years since the com-

(1) [1944] P. 85.
(2) [1938] P. 93.
(3) [1934] P. 149.

mencement of the desertion could be presumed to have elapsed.

HODSON J. Since three years' desertion before the presentation of the petition has not been established, I have been asked to cure the difficulty by allowing a supplemental petition to be filed, because by now (that is to-day) considerably more than three years have elapsed since the wife was deserted; and I have to consider whether that is possible. I have had to consider this question before. In the case of *Chapman* v. *Chapman* (1), I referred to s. 2 of the Matrimonial Causes Act, 1937, which provides that: "A petition for divorce may be presented to the High "Court . . . . either by the husband or by the wife "on the ground that the respondent . . . . has deserted "the petitioner without cause for a period of at least three "years immediately preceding the presentation of the "petition"; and the question which arose there was whether the presentation of the petition need be of the original petition or not; and I came to the conclusion that it must be, having regard to the language of the Court of Appeal in the case of *Sandler* v. *Sandler* (2), where Lord Hanworth M.R. said: "....it is impossible to hold that a supplemental petition "is anything more than a part of and an amendment to the "original petition." He was not, in that case, dealing with the point of desertion at all; he was dealing with the question whether collusion in respect of a main petition affected a supplemental petition, and he said that it did, and the Court of Appeal unanimously came to that conclusion. The position in this case seems to me to be exactly the same. I have to consider whether a supplemental petition in this case would be anything more than an amendment of the original petition; and I see nothing to indicate the contrary.

The point came up before Barnard J. in the case of *Howard-Williams* v. *Howard-Williams* (3). The matter arose without argument on the other side; both spouses were supporting the application for the matter to be dealt with by way of a supplemental petition. Barnard J.'s attention was not drawn to the decision in *Chapman* v. *Chapman* (1); but in view of a decision of the House of Lords in the case of *Cohen* v. *Cohen* (4), it was argued before him that, as there were

(1) [1938] P. 93.
(2) [1934] P. 149, 156.
(3) [1944] P. 85.
(4) [1940] A. C. 631.

1946

SPAWFORTH v. SPAWFORTH.

Hodson J.

old cases before 1937 where desertion had been brought up to date, so to speak, by a supplemental petition, there could be no possible harm in it; and those cases were referred to without disapproval in *Cohen* v. *Cohen* (1) in 1940. Of course, the point that was not brought to his notice was that the old cases dealt with desertion for two years and upwards simpliciter, which was introduced by the Matrimonial Causes Act, 1857, and had nothing to do with desertion immediately preceding the presentation of the petition, and therefore did not touch this point at all.

I have been authorized by Barnard J. to say that the case of *Chapman* v. *Chapman* (2) was not brought to his attention, and that he is now at any rate inclined to the view that he would have come to the same conclusion as myself if he had considered the matter in the light of the wording of the Act of 1937.

Mr. Roland Adams has pointed out that, if the suit could always be put in order by a supplemental petition, a wife could present a petition for divorce as soon as she was deserted, on the ground of desertion for three years and upwards, and obtain her alimony pendente lite, and stand the case over until the three years had actually run out, and then bring it up to date by a supplemental petition. Of course, that might be possible—I do not know—but, in my view of the wording of this statute, the supplemental petition must be treated as part of the original petition, and "the petition" in the statute means the original petition, and the three years must precede that date. The consequence of that is that this petition fails, the desertion not having lasted for the three years before the petition.

Petition dismissed. Prayer in the answer rejected.

Solicitors for the petitioner: *Spiro & Steele.*
Solicitors for the respondent: *Jacques & Co.*

(1) [1940] A. C. 631. (2) [1938] P. 93.

I. G. R. M.

THE TOLTEN.

C. A.

1946
Feb. 11, 12, 13, 14; *Apr.* 16.

Scott, Somervell and Cohen L.JJ.

Shipping—Damage—Collision with wharf at Lagos—Alleged negligence of ship—Action in rem by wharf owners—Jurisdiction—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 7.

The High Court, in the exercise of its Admiralty jurisdiction, by the general law of the sea and under s. 7 of the Admiralty Court Act, 1861, has jurisdiction to adjudicate in an action in rem where the claim is against the owners of a ship which has done damage to a wharf or to any structure attached to and forming part of the soil of foreign territory. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 22, sub-s. 1 (*a*) (iv) did not create or extend the jurisdiction.

British South Africa Co. v. *Companhia de Moçambique* [1893] A. C. 602 discussed and distinguished.

APPEAL from the decision of Bucknill J., on a preliminary objection.

An action in rem was brought by the United Africa Co., Ld., who claimed to be the owners and occupiers of the Bulk Oil Wharf at Lagos, against the owners of the British motor vessel *Tolten* for damage done to their wharf when the *Tolten* came into collision with it on October 13, 1944, while proceeding to sea. The plaintiffs alleged that the vessel was negligently navigated by the defendants or their servants on board the *Tolten*. The defendants, who by their pleadings specifically denied (inter alia) that the plaintiffs were the owners and occupiers of the wharf in question, objected, on a preliminary point of law, that the court had no jurisdiction to adjudicate in an action in rem for damage done by a vessel to property attached to foreign soil.

Bucknill J. in a reserved judgment (1) on December 3, 1945, decided in favour of the plaintiffs, and held that the Admiralty Court Act, 1861, stated simply that the High Court of Admiralty shall have jurisdiction over "any claim for damage done by "any ship," and did not limit the locality in any way; that that Act had been held to apply to damage done by a ship to a pier in British waters, and to damage by collision between ships in foreign waters. His Lordship saw no reason why a case of the kind in question should not be included within the plain words of the statute, and overruled the objection.

The defendants appealed.

(1) [1946] W. N. 7.

C. A.
1946
THE TOLTEN.

P. Devlin K.C. for the defendants. An English court will not entertain actions for damage to land situate outside England. The judgment in the court below was wrongly based on two main grounds: (1.) That by the Judicature Act, 1925, s. 22, the court had jurisdiction in any claim arising out of "damage done by any ship"; and (2.) that, even if the rule meant that it did not apply to actions brought in personam, it did apply to an action in rem where a maritime lien exists. The ship in question here was not arrested. [In answer to Somervell L.J. The court has jurisdiction where there is a claim by a British ship and a foreign ship which arose in foreign waters. A writ in rem is addressed to the owners of a ship and it would not be necessary to arrest a ship against which there was a claim.]

[*Bateson K.C* for the plaintiffs: The power of arrest produces the bail; seldom in practice is a ship arrested.]

If s. 22 of the Judicature Act, 1925, were read without limitation at all, it would apply equally to an action in rem or an action in personam. One must either bring a particular action within the section, whether in rem or in personam, or not. The trial judge himself doubted whether there was jurisdiction in personam. If one were to read the section without limitation then one could say that the Act gives jurisdiction over foreign sovereigns.

[SCOTT L.J. By the general rule there is no jurisdiction over foreign sovereigns.]

It is not a rule but a settled practice not to apply jurisdiction over sovereigns: He referred to *Guaranty Trust Co. of New York* v. *Hannay & Co.*, per Pickford L.J. (1).

The reason why common law and chancery courts do not exercise their jurisdiction over foreign soil ought to be regarded as applying also to Admiralty Courts, i.e., they cannot make their decree effective in a foreign jurisdiction: see the *Moçambique* case (2), where Lord Esher M.R. puts it on the ground of "universal consent." Lord Herschell in the same case (3) when it went to the House of Lords, supported that view. His Lordship said when referring to the *M. Moxham* (4): "In the case of the *M. Moxham* (4), where injury had been "caused to a pier belonging to an English company, but "situated in a Spanish port, the ship, by the alleged negligent "navigation of which the damage had been caused, was

(1) [1915] 2 K. B. 536, 562, 563.
(2) [1892] 2 Q. B. 358.
(3) [1893] A. C. 622.
(4) (1875) 1 P. D. 43, 107.

" arrested in Spain, but was released on agreement with the " owners that their liability should be determined by proceed- " ings in the English courts. James L.J., said, that but for " the agreement come to between the parties ' very grave " ' difficulties indeed might have arisen as to the jurisdiction " ' of this court to entertain any jurisdiction or proceedings " ' whatever with respect to injury done to foreign soil '."

The rule is stated simply in Salmond on Torts (10th ed.), s. 42, at p. 185 : " No action for tort in respect of foreign land. " No action will lie in England for any trespass or other tort " committed in respect of land situated out of England. This " is so even if no question as to the title to the land is in issue " between the parties, and even though the property is " situated in uncivilized regions out of the territory and " jurisdiction of any civilized state. In the case of contracts " and trusts, on the other hand, the jurisdiction of English " courts is not excluded by the fact that the land to which the " contract or trust relates is out of England."

That statement goes further than is necessary to this case. With regard to the principle of effectiveness : In an action in rem the ship can be arrested and the court can effect its judgment, but the answer to that is : The rule does not depend on the principle of effectiveness, because if it did it would apply to any other matter when the person (the defendant) could be found within the jurisdiction. The distinction between an action in rem and an action in personam is only a procedural distinction. See Roscoe's Admiralty Practice, 5th ed., at p. 29 : " An action in rem being a form of procedure only a " successful litigant in such an action has a right to recover " damages against the property of a defendant who has " appeared in an action in rem other than the ship against " which the writ in rem has been issued."

The rule applicable at common law or in chancery should also apply to admiralty actions whether in rem or in personam.

Owen Bateson K.C. and *Knox Cunningham* for the plaintiffs. The title to the damaged wharf for the purposes of this objection is not in issue at all. The objection is raised on the facts set out in the statement of claim. The title is denied only if the objection to the jurisdiction fails. The question simply resolves itself in a case where damage is " done by a ship." This is not a case of trespass in the narrow sense, that is, the wrongful entry on land. The form of the notice of appeal does not raise the question of title to the land. Mr. Devlin said that he

C. A. 1946 — THE TOLTEN.

invoked the rule of settled practice. The courts, even where they have jurisdiction refused to exercise it for two reasons : (1.) ineffectiveness, (2.) interference with the comity of nations, i.e., foreign sovereigns. With regard to " effectiveness," the only relief sought in this case is for damage and the rule has no application here. The objection on the ground of " comity of " nations " also cannot be sustained in this case because this is directed against a private individual, a British subject, who is in England.

In the cases in which the court has refused to exercise jurisdiction there has always been a dispute as to title of land. (See *Skinner* v. *East-India Co.* (1).) There are certain essentials in admiralty procedure which take this case out of the settled rule of practice in common law and chancery courts. The damage complained of in the present case is done, not by a person, but by a thing, a ship. The admiralty court has jurisdiction not only on the high seas but also within territorial waters of foreign countries : see the *Diana* (2). The learned trial judge, in the course of his judgment, referred to " hardship," but that consideration formed no basis of his judgment. If one does not catch a ship which caused him damage while the vessel is to be got at, she could get away while the injured party is engaged in discovering who, and where, are the owners. The admiralty court has always exercised a wider jurisdiction than common law courts.

The plaintiffs had a maritime lien on the defendants' ship which goes far beyond a maritime right in rem ; it operates on a ship " wherever she shall be found " by all laws which recognize maritime liens.

P. Devlin K.C. in reply. A party who challenges jurisdiction has the right to know, on the raising of a preliminary objection, whether the court has jurisdiction before the facts of the claim come to be tried. It is true that the title to the land was not in issue on the present application, but if there is a trial of this action there may arise a dispute of title to land by reason of para. 2 of the statement of claim. There are certain classes of cases where, on an objection such as the one before the court, the court had reason to suppose that the question of title to land in a foreign country, such as in trespass, would arise the court should refuse to exercise its jurisdiction. The rule invoked goes to " authority " and not to " power." The court has " power " to bring me before the court, but it has no

(1) (1666) 6 St. Tr. 710. (2) (1862) Lush. 539.

" authority " to grant the plaintiff relief in this case. The real kernel of the case is that there is no maritime lien in respect of a claim for damage to foreign land. A maritime lien can only operate through the court ; it is a creature of procedure rather than a real right of property. [Counsel referred to the *Bold Buccleugh* (1), the *Two Ellens* (2), the *Parlement Belge* (3).]

Cur. adv. vult.

April 16. SCOTT L.J. This appeal by the defendants raises a preliminary question of law in an ordinary damage action in rem against the owners of the steamship *Tolten*. The plaintiffs allege in the statement of claim that they were owners and occupiers of a wharf at Lagos and that the defendant ship, by negligent navigation, damaged it. The defendants contend that the court has no jurisdiction to try the case.

The issue is not whether the statement of claim discloses a good cause of action, but whether the court has jurisdiction to entertain it. The Judicature Act, 1925, by s. 22, sub-s. 1 (*a*), provides that " the High Court shall, in relation to admiralty " matters, have the following jurisdiction . . . . " inter alia (iv.) " any claim for damage done by a ship " ; and by s. 33, sub-s. 2, that the jurisdiction may be either in personam or in rem. That Act did not create new jurisdiction ; for those provisions merely re-stated the jurisdiction conferred by ss. 7 and 35 of the Admiralty Court Act, 1861, in identical terms, and that Act was intended to extend jurisdiction. Bucknill J. (as he then was) relied on the wide and unqualified language there used, and held that it covered the facts of the present case. I agree entirely with his judgment. The defendants' argument for a limiting interpretation of those very words raises questions of general importance, relating on the one hand to public and private international law, both procedural and substantive, and on the other to the nature and scope of English jurisdiction in admiralty and to the nature and effects of the maritime lien for damage as recognized to-day by British admiralty courts. In the result, the forensic dispute has taken shape as an antinomy between Mr. Devlin's proposition that there is in England a universal rule of private international law, based on settled practice, that no English court ever takes cognizance of a tort committed in respect of land situate abroad, and the

(1) (1851) 7 Moo. P. C. 267.
(2) (1872) L. R. 3 A. & E. 345.
(3) (1880) 5 P. D. 197.

C. A.
1946
THE TOLTEN.
Scott L.J.

counter proposition submitted by Mr. Bateson that the Admiralty Division will always, or at least in an action in rem, take cognizance of " damage " done by a ship anywhere within the geographical limits of admiralty jurisdiction ; and also will give effect to the proprietary right of maritime lien to which the tortious act or default of the wrong-doing ship automatically gives rise in favour of the injured party wherever his property may have been situate, whether in this country, or out of it, whether it was afloat or on land, and whether movable or immovable. The two competing principles of law, at any rate as originally propounded by opposing counsel, are equally universal in scope, and on the facts of the present case, seem to be mutually exclusive—one therefore must give way to the other, or one must constitute an exception from the other. When I speak of the wrong-doing ship, I use the personification metaphorically for the persons responsible in law for her negligent navigation.

So far as this court is concerned, I think that, subject to one caveat, our municipal rule of common law jurisdiction, as laid down by the House of Lords in *British South Africa Company* v. *The Companhia de Moçambique* (1) is correctly stated in the headnote to the report : " The Supreme Court of Judicature " has no jurisdiction to entertain an action to recover damages " for a trespass to land situate abroad . . . . " The caveat is that the House was addressing its mind not to an admiralty action in rem against a ship, but to a ordinary common law action for breaking and entering the plaintiff's lands, for ejecting the plaintiff therefrom and for damages for such trespass. Still less was it considering the application of its rule to maritime liens. As the statement of claim was originally framed, the Companhia de Moçambique claimed (1.) a declaration that the plaintiffs were lawfully in possession and occupation, and (2.) an injunction to restrain the defendants from asserting title to and continuing in occupation of the said lands. The British South Africa Company by their defence, denied the plaintiffs' title, and the trespass alleged, and further pleaded that the Queen's Bench Division had no jurisdiction to adjudicate upon the plaintiffs' claim. Lawrence J. and Wright J. upheld the demurrer and dismissed the action, so far as it claimed a declaration of title and an injunction. The plaintiffs appealed to the Court of Appeal (2). There they abandoned their claims for a declaration and an injunction,

(1) [1893] A. C. 602.

(2) [1892] 2 Q. B. 358.

thus formally eliminating the issue as to title, and limiting the action to one of damages for trespass ; and on that footing the court, by a majority, Fry and Lopes L.JJ. (Lord Esher M.R., dissenting) allowed the appeal. The dissenting judgment was, however, upheld unanimously in the House of Lords (1). Lord Herschell L.C., at p. 617 began his opinion by pointing out that in the era before the Judicature Acts, when the distinction between transitory and local actions was vital on the question of jurisdiction, no action for damages for trespass to lands situate in a foreign country could be brought (see p. 619). At p. 621 he referred to *Doulson* v. *Matthews* (2), and other decisions, and also to the work on "Conflict of Laws," by Mr. Justice Story of the U.S.A. ; but said (3) : "My Lords, "I have come to the conclusion that the grounds upon which "the courts have hitherto refused to exercise jurisdiction in "actions of trespass to lands situate abroad were substantial "and not technical, and that the rules of procedure under "the Judicature Acts have not conferred a jurisdiction which "did not exist before."

Mr. Bateson submitted that the issue of title never passed wholly out of the *Moçambique* case, and that there are certain passages of Lord Herschell's opinion which indicate that the noble and learned Lord was not intending his words to apply to a mere case of damages for trespass. He also sought to distinguish the present action on the ground that in a damage action in Admiralty for injuries to fixed property by the negligence of those in charge of the navigation of the defendant ship, no issue of title need arise, since the defendant wrongdoer cannot challenge the plaintiff's right of action if the plaintiff establishes his de facto possession at the time the wrong was committed. Nor could any occasion arise, in his submission, for the courts being called on to enforce any order by execution in Lagos where the plaintiffs' wharf is situate. In this context he prayed in aid the passage in Lord Herschell's judgment, on p. 624, where his Lordship seemed, in counsel's submission, to be indicating that an action for mere damages, where no issue of title to the foreign land is involved, might be actionable in our courts. I recognize that in a case where the action is brought by a party in possession of land and structures, suing merely for damages for negligence, or even, it may be, for trespass quare clausum fregit, and the plaintiff relies solely on his

(1) [1893] A. C. 602.
(2) [1792] 4 T. R. 503.
(3) [1893] A. C. 629.

C. A.
1946
THE TOLTEN.
Scott L.J.

possession as the foundation for his action, the House of Lords might hereafter distinguish the *Moçambique* case. I do not think, however, that it would be right for this court to attempt that distinction, as I am satisfied that, in regard to common law actions, no such distinction was then in the mind of the House ; and therefore, in spite of Mr. Bateson's argument, I accept the statement of the legal position in the headnote to that case as an accurate summary of the decision of the House in regard to common law actions.

The question accordingly, which we have to decide, is whether that rule of common law jurisdiction prevents the plaintiffs having their present action in rem for damage (in the admiralty sense of that word) tried and decided in the Admiralty Division. In my opinion it does not. The question is, however, one of far-reaching importance and calls for careful consideration of British admiralty law, and if there be doubt about that, then of the general law of the sea amongst Western nations, out of which our maritime law largely grew, and from which it is to the interest of maritime commerce that it should not unnecessarily diverge. Judicial action cannot of course reverse a definite departure from the general law of the sea once definitely taken by our own maritime law and expressed in the judgment of a court which binds : but where there is doubt about some rule or principle of our national law, and one solution of the doubt would conform to the general law and the other would produce divergence, the traditional view of our admiralty judges is in favour of the solution which will promote uniformity. For this there are two good reasons, first, because that course will probably be the true reading of our legal development, and, secondly, because uniformity of sea law throughout the world is so important for the welfare of maritime commerce that to aim at it is a right judicial principle—as many of our admiralty judges have said in the past.

The problem of principle before us raises logically three questions for consideration though an affirmative answer to the second or even only to the third would suffice for the dismissal of the present appeal. Proceedings in admiralty against the owners of a delinquent ship may, at the choice of the plaintiffs be either in personam or in rem. In the former procedure the defendants are named as in a King's Bench writ ; in the latter, the writ is addressed to " the owners of the . . . . ship " as defendants ; the proceeding is against the ship, and no personal service is required. In *Castrique* v. *Imrie* (1), Lord Chelmsford

(1) (1869) L. R. 4 H. L. 414, 448.

thus described the nature and effect of the admiralty jurisdiction in rem : " To sum up my opinion in the words of " Blackburn J., and the other learned judges who concurred " with him, ' I think the inquiry is, first, whether the subject " ' matter was so situated as to be within the lawful control " ' of the State under the authority of which the court sits ; " ' and, secondly, whether the sovereign authority of the State " ' has conferred on the court jurisdiction to decide as to the " ' disposition of the thing, and the court has acted within its " ' jurisdiction. If these conditions are fulfilled, the adjudi- " ' cation is conclusive against all the world '." The first of my three questions is : " Has the procedural bar of the " *Moçambique* rule at common law any application to the " jurisdiction of the Admiralty Division in an admiralty " ' damage ' action whether in personam or in rem ? " The second question is : " Even if an admiralty action in personam " can for the purpose of that rule, properly be assimilated to a " common law action, do the peculiar characteristics of " admiralty jurisdiction in rem so differ from common law " jurisdiction as to make the common law rule wholly in- " appropriate ? " The third question is : " If even the " peculiar nature of admiralty jurisdiction in rem does not of " itself exclude the bar, does the substantive law in admiralty, " that damage by a ship through its maritime fault ipso facto " gives rise to a maritime lien in favour of the injured party, " make the crucial difference, and enable, and indeed compel, " the admiralty court to exercise its jurisdiction over the high " seas in an action in rem against the ship for damage done " by its negligent navigation to fixed property abroad, without " regard to the procedural bar of the common law as enunciated " in the *Moçambique* case ? " My personification of the ship is of course metaphorical. In the present appeal, the action being in rem my first question is in a sense academic, and it might seem to be unnecessary to express any final opinion one way or the other. Even the second question might be thought superfluous if an affirmative answer is given to the third, as I think it certainly must be; for when addressed to such a proprietary right, the *Moçambique* rule can, in my opinion, have no application. On the other hand the general nature of admiralty law and jurisdiction is so different in kind from that of the common law, that to me the *Moçambique* rule seems incompatible both with the general law of the sea, as I understand it, and equally so with our admiralty law and juris-

C. A.
1946
THE TOLTEN.
Scott L.J.

diction, as already expressed in judgments and statutes, and, therefore, I would answer all three of my questions by excluding it. Besides, I feel that all the three questions are really involved in the discussion of any one of them. Nevertheless I will begin with the third question because the answer to that is plainest.

The maritime lien is one of the first principles of the law of the sea, and very far-reaching in its effects. In the *Bold Buccleugh* (1), Sir John Jervis delivering the judgment of the Privy Council, said this: "Having its origin in this "rule of the civil law, a maritime lien is well defined by "Lord Tenterden, to mean a claim or privilege upon a thing "to be carried into effect by legal process; and Mr. Justice "Story (1 Sumner, 78) explains that process to be a proceeding "in rem, and adds, that wherever a lien or claim is given upon "the thing, then the Admiralty enforces it by a proceeding in "rem, and indeed is the only court competent to enforce it. "A maritime lien is the foundation of the proceeding in rem, "a process to make perfect a right inchoate from the moment "the lien attaches." The learned judge in that judgment added an obiter dictum which was subsequently disapproved; but that error does not touch the passage I have quoted. In the *Sara* (2), Lord Macnaghten said (3): "A 'maritime lien,' "as was observed in the *Two Ellens* (4) must be something "which adheres to the ship from the time that the facts "happened which gave the maritime lien, and then continues "binding on the ship until it is discharged . . . . It commences "and there it continues binding on the ship until it comes to an "end." In the *Ripon City* (5), Gorell Barnes J. reviewed the history of the maritime lien in our law in a long judgment from which, so far as I know, there has been no subsequent dissent. The following extracts describe the essential characteristics. He said (6): "The definition of a maritime lien as recognized "by the law maritime given by Lord Tenterden has thus been "adopted. It is a privileged claim upon a thing in respect of "service done to it or injury caused by it, to be carried "effect by legal process." Later on he continued: into "The result of my examination of these principles and authori- "ties is as follows: The law now recognizes maritime liens in "certain classes of claims, the principal being bottomry,

(1) 7 Moo. P. C. 267, 284.
(2) (1889) 14 A. C. 209.
(3) Ibid. 225.
(4) (1872) L. R. 4 P. C. 161.
(5) [1897] P. 226.
(6) Ibid. 241, 242, 244.

" salvage, wages, masters' wages, disbursements and liabilities, " and damage. According to the definition above given, such " a lien is a privileged claim upon a vessel in respect of service " done to it, or injury caused by it, to be carried into effect by " legal process. It is a right acquired by one over a thing " belonging to another—a jus in re alienâ. It is, so to speak, " a subtraction from the absolute property of the owner in " the thing." Note the phrase " privileged claim "; I shall revert to it later. On p. 244 is an important passage indicating the learned judge's view of the proper judicial attitude, in considering doubtful questions of law, to the public interest in encouraging prudent navigation on the one hand and the proper protection to the party injured by negligent navigation on the other: " In my opinion, it is right in principle and only " reasonable, in order to secure prudent navigation, that third " persons whose property is damaged by negligence in the " navigation of a vessel by those in charge of her should not be " deprived of the security of the vessel . . . . " The argument against " the security " of the lien depended on the facts of that case which were quite different to those of the present case. The principle, however, underlying the general law of the sea, of protecting maritime commerce, which the learned judge prayed in aid, is directly applicable in the present case, and is one reason for paying regard to the international conventions to which I shall refer later. The positive principle of the automatic attachment to the ship of the creditor's lien on it is, at least, as indubitably a rule of substantive law in admiralty, as the negative principle, on which the *Moçambique* rule rests, is at common law, and, I think, more so. I can see no prima facie reason why the admiralty principle should give way to the common law rule. That the creditor secured by his lien will be deprived of a vested right of property, if the court is prevented by the *Moçambique* rule from enforcing his lien, is obvious. It will also follow, as I will explain presently, that he may lose all remedy. In most actions in rem for damage the ship is released on bail, but cases may occur where the liens or rights in rem against the ship are so heavy as to exceed the ship's value to her owners, who, in such case, will probably not enter an appearance and obtain the ship's release on bail. The lien consists in the substantive right of putting into operation the admiralty court's executive function of arresting and selling the ship, so as to give a clear title to the purchaser, and thereby enforcing distribution of the proceeds amongst the lien creditors

C. A.
1946
THE TOLTEN.
Scott L.J.

in accordance with their several priorities, and subject thereto rateably. I call that function of the court "executive" because, once the lien is admitted, or is established by evidence of the right to compensation for damage suffered through the defendant ship's negligence, there is then no further judicial function for the court to perform, save that in the registry where priorities, quantum and distribution are dealt with. When the court has thus discharged the whole of the secured claims, the balance (if any) of the proceeds will, if there be no limitation of liability to prevent it, go to the unsecured creditors and the final surplus (if any) to the owners. Now contrast the position if the damage claimant were to be prevented by the *Moçambique* rule from starting or continuing his action in rem; as in the case where some other creditor with a maritime lien—perhaps for a subsequent collision, or salvage, or wages, or bottomry, or master's disbursements—arrests the ship and proceeds to judgment, in most cases unopposed. The reference is carried through, and the proceeds of the sale of the ship are completely distributed. The damage creditor looks on disconsolate but gets nothing. All he has left is the doubtful possibility of a personal action against the owners on the principle of the *Dictator* (1). Even if he succeeds in serving the shipowner with a personal writ, he will be met with the *Moçambique* objection, and the submission that that rule applies a fortiori to an action in personam; possibly also with the defence that the whole of the fund constituting the limit of the shipowner's liability has been distributed amongst the claimants who have been admitted to proof against it. In any event he will have lost his priority, and the defendant may have no other assets within the jurisdiction. If the total claims exceed the limit of the owner's liability, the damage creditor will also lose any right of action in personam, which otherwise he might have prosecuted in the court of the country where the offending ship had caused the damage to the plaintiffs' land: for the limitation of shipowners' liability, whether under our statutory system, or under the continental system of limiting liability to the value of the ship and freight, extends to all claims at least in respect of the one accident. One can state the position, for which the defendants contend, almost as a reductio ad absurdum. Suppose ship A., by one and the same act of negligent navigation at Lagos, to have caused injury to (1.) the plaintiff's wharf, (2.) merchandise on the wharf,

(1) [1892] P. 304.

(3.) people on the wharf, (4.) ship B. lying near the wharf. On those assumed facts, the injured parties numbers 2, 3 and 4 can conduct a suit in rem in the admiralty court, but if the *Moçambique* rule is applied, number 1 is barred. Can anything more contrary to common sense be imagined?

The answer of the plaintiffs based on the maritime lien alone is enough of itself to dismiss the appeal; but admiralty jurisdiction is an integral whole, and cannot be divided up into water-tight compartments. Fundamental questions of the jurisdiction of our admiralty court, and indeed of the general law of the sea are raised by the appeal, and I think it is right to deal with the wider issues raised by my first and second questions, apart from that of the maritime lien by itself. In my view the law maritime of "damage," as administered in our admiralty court, vests a right of action in any person, who suffers an injury anywhere in the world either to his person or to his property, whether movable or immovable, afloat or ashore, when caused by the maritime fault of the owner of a ship, he being responsible for the acts or defaults of his servants. There may be an exception where the damage is done in foreign territorial waters, and it is proved that by the law of that country the English doctrine of respondeat superior does not apply—see the *M. Moxham* (1), but there is, naturally, no averment in the defence in the present case, that that English doctrine is not the law of the British colony of Lagos. If the substantive law administered by our admiralty court be what I have stated, it follows, at least logically, that it must be the same whether the procedure be in rem or in personam. I do not discuss whether the proprietary right vested in the damage claimant by his maritime lien can or cannot be enforced by the admiralty court in an action in personam, because that is irrelevant in this appeal. As was pointed out by Lord Herschell in the *Moçambique* case (2), international law is not, as such, binding upon our municipal courts, but only in so far as our courts have made it a part of our municipal law—whether as a result of statutory enactment or because the particular principle of international law, which may be in question, has been adopted by our courts as one recognized generally by all civilized nations. A comparable principle applies in regard to the general law of the sea and the maritime law administered in the admiralty court. That process of adoption is observable historically in the development of English admiralty law and jurisdiction.

(1) 1 P. D. 107. (2) [1893] A. C. 602, 624.

C. A.
1946
THE TOLTEN.
Scott L.J.

Originally the jurisdiction, both civil and criminal, was unlimited over the " high seas." The struggle with the common law courts has no bearing on this appeal, at any rate until the Admiralty Court Act, 1840. The present jurisdiction of the Admiralty Division of the High Court is based partly on statutes but primarily, and mostly on principles previously adopted by the admiralty court from the general law of the sea, observed by Western nations, instanced in early time, e.g., by the laws of Oleron, and in later times widely followed in the general practice of continental nations. It has been characteristic of English judges exercising admiralty jurisdiction as I have already said, to look to " the general law of the sea " for two allied, but distinct, purposes: first to resolve doubts on a question of English law by adopting what they believed to be the relevant rule of the " general law " ; and secondly, as a principle of judicial policy in order to avoid creating divergence by our law from the general law. The importance to maritime commerce of uniformity in all seas, the world over, has received frequent emphasis, both before the Judicature Acts and since. Judicial illustrations will be found in later citations in this judgment. If there be any doubt as to what our admiralty law is in the present case, both judicial practices are relevant, and, in my opinion, it is highly important to prevent any such restriction of our admiralty jurisdiction as would result from even a partial admittance of the *Moçambique* rule, that is, even apart from the maritime lien. I therefore pray in aid all considerations which go to show it is equally inapplicable to any " cause " of damage " whether in rem, or even in personam. For this reason I regard it as relevant and proper to follow judicial precedent and resort to " the general law of the sea," following in the wake of Lord Stowell and Dr. Lushington in order to resolve any doubt there may be about our law and to preserve international uniformity in maritime law.

But in taking this course I recognize that I may be criticized on the ground first, that there is no evidence of foreign law before the court, and secondly, that the references, which I am about to make to two conventions on maritime law, which have been adopted, and ratified, by very many countries and passed into law by a considerable number of countries since 1909 are both inadmissible for want of proof and also irrelevant. To the first criticism I conceive the proper answer to be that I do no more than our past admiralty judges have done when they made statements about " the general law of the sea " ; and in

regard to the conventions, that they are public documents which I use merely as illustrations of the trend of legal opinion. Further, that to the very limited extent to which I pray them in aid, it is judicially my duty to use the knowledge of the "general law of the sea," which I happen to possess through having been personally concerned in the making of all of them.

The substantial points of their relevance are: (1.) that our maritime lien and the continental "privilege" are shown by them to be identical in legal meaning, so far as is material to any question now before us, (2.) that the convention on mortgages and liens to which I shall refer, is based on that identity, (3.) that that identity is again a fundamental assumption of the convention on limitation of shipowners' liability, to which I shall also refer, and (4.) that that relationship of liens to limitation of liability is essentially characteristic of the general law of the sea, of our own law, and of the conventions.

Limitation of shipowners' liability, and maritime lien seem at first sight unconnected topics, but they are not. There is an integral—almost an organic—connexion between the two in the history of our own admiralty law, and that connexion comes from the ancient law of the sea in which it is deep-rooted. The basic principle underlying the correlation is seen most clearly in its original form, which was still extant in Continental law before the conventions. Both rules were in truth adopted from the customs of merchants (which term then included shipowners), in whose usage they had been applied as measures of public policy for the encouragement of sea commerce. The first object was to bring within foreseeable and moderate limits the risks to be undertaken by the shipowner, when he adventured his ship on a commercial enterprise. The means adopted was to keep his financial liabilities within the ambit of his "fortune de mer," consisting of ship and freight at risk on the voyage. The object of the second was, within that limit, to give to the main creditors of the shipowner, whose claims arose out of his maritime adventure, the protection of a "privileged" position—that of the maritime lien, or its Continental equivalent, the French word "privilège." The limitation and the privilege were thus interdependent in historic origin. By the word "claims," I mean well-founded claims, enforceable by action—the active correlative of our passive words "debt" or liability (in French the word "créance") for which our language has no equivalent. The phrase "maritime lien" was not the original expression in our admiralty

C. A.
1946
THE TOLTEN.
Scott L.J.

diction. We borrowed from the French, who had in their word " privilege " a clearer and less ambiguous name : hence their telling phrase " créances privilégiées " to describe the secured rights of the sea creditors in the reciprocal adjustment made by sea law, which I have called a " correlation." There is no difference of meaning, so far as anything in the present appeal is concerned, between the " privilège " of Continental law and our " maritime lien." And our judges in early cases used our word " privilege " with the same meaning as that in which " maritime lien " was subsequently used. It is echoed in the passage from Lord Gorell's judgment in the *Ripon City* (1) which I have already quoted. He there twice speaks of " privileged claims "—the English version of the French " créances privilégiées." The essence of the " privilege " was and still is, whether in Continental or in English law, that it comes into existence automatically without any antecedent formality, and simultaneously with the cause of action, and confers a true charge on the ship and freight of a proprietary kind in favour of the " privileged " creditor. The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence of mortgages. Our admiralty judges used the phrases " the general law of the " sea," or " the general maritime law," or " the ordinary mari- " time law " to describe the body of law which our admiralty court recognized as administered in all maritime countries and applied in England. (See those phrases, for instance, used by Dr. Lushington in the *Bonaparte* (2), and the *Hamburg* (3).) How they obtained their knowledge of the " general law of " the sea " they did not state ; but I do not think it was from expert witnesses in court.

The principle of limitation was given operative effect by the " droit de l'abandon "—the right of the shipowner to acquit himself of all the " créances du voyage," by abandoning his ship to his creditors, with a view to the ship being realized by the court and the proceeds distributed rateably amongst the creditors in accordance with the several priorities of their " privilèges." Limitation with us first came definitely into our statute law in 1734 when an Act (7 Geo. 2, c. 15) was passed for limiting shipowners' liability for loss of the cargo caused by negligence of master and crew to the value of the ship and

(1) [1897] P. 226, 241.
(2) (1850) 3 W. Rob. 298.
(3) (1864) Br. & L. 253.

freight. It may well be that that Act was merely declaratory of maritime law as tentatively applied by the admiralty court. Whether that was so I have not investigated. That the idea came from the general law of the sea as administered by Continental nations is obvious. In 1813 the Act of 53 Geo. 3, c. 159, applied the same limitation to collision claimants, the preamble reciting that " it is of the utmost consequence and importance " to promote the increase of the number of ships and vessels " belonging to the United Kingdom and to prevent any " discouragement to merchants and others from being interested " therein." Our present statutory method of limiting the owner's liability to an amount based on X*l.* per ton of the ship's tonnage was first adopted by Parliament in the Merchant Shipping Act, 1854. The artificial measure of 15*l.* per ton of the ship's tonnage where personal injuries and loss of life are caused was introduced by that Act, but split up by the Act of 1862 into 8*l.* per ton for damage to property, with an extra 7*l.* where there is loss of life or personal injury. It is thus apparent that our statutory system was derived from the Continental system of the " fortune de mer " : and that the correlation between limitation and lien, remains a foundation of our admiralty law to-day, as adapted by Parliament from the general law of the sea. That correlation, in my view, of itself operates as a very strong, if not a compelling reason for resolving any doubtful question of law in favour of maintaining the essential character of the maritime lien wherever in the world it may arise and attach; and therefore of admitting no exception unless it amounts to a paramount rule of law like the immunity of a sovereign before the courts of any other sovereign as in the *Parlement Belge* (1) and the *Tervaete* (2), to which I will revert.

During the last forty years the correlation has been emphasized in the two conventions to which I have referred. They are products of the world-wide movement for the unification of maritime law in the interest of the overseas commerce of all nations, conducted by the International Maritime Committee which was formed in Belgium on the initiative of Louis Franck, a great Belgium lawyer and statesman, now unfortunately dead. The first conventions so passed were on salvage and collision. They were brought into force in the United Kingdom by the Maritime Conventions Act, 1911, supplemented by the abolition of the defence of compulsory pilotage

(1) 5 P. D. 197. (2) [1922] P. 259.

C. A.
1946
THE TOLTEN.
Scott L.J.

(a rule of law which had been peculiar to this country) in the Pilotage Act, 1913. Our Sea Carriage of Goods Act gave legislative effect to another convention. Similar procedure produced in 1926 three more conventions, of which the subjects were: (1.) Immunity of State-owned Ships; (2.) Mortgages and Liens; and (3.) Limitation of Shipowners' Liability. The Immunity Convention (as extended by a Protocol of 1934) provides for the abolition of immunity of state-owned or state-operated ships when engaged in commerce (see Cmd. Papers 5672-3 of 1938); and when translated into British legislation, will prevent the repetition of such decisions as the *Parlement Belge* (1) and the *Tervaete* (2), where the plea of sovereign immunity allowed state-owned commercial vessels to escape adjudication on the merits. The Mortgages and Liens Convention contains an agreed code of law on all charges on ships whether written or unwritten. There is, in my experience, no doubt that by the general law of the sea, as in our law, the damage lien attaches as from the moment of damage, and applies equally in favour of the owner of an injured ship or of any injured structure on land. Five English judges (four of them from the Admiralty Division, including two Presidents) have been concerned in the conferences, unofficial and official, which produced the conventions.

The damage claimant under art. 2 of the Mortgages and Liens Convention gets his maritime lien on the offending ship for damage caused by its faulty navigation, on exactly the same footing for damage to fixed structures (ouvrages d'art) in harbours, docks or navigable water-ways (rues navigables) as for damage to a ship. One salient point about that convention is that nowhere in it is there the faintest hint that the automatic coming into existence of the damage lien is affected in any way whatever by the fact that the fixed property on land, in respect of which the plaintiff claims, is situate in a foreign country, so as to deprive the courts in any other country of jurisdiction. Such an exception would in my opinion be as contrary to the general law of the sea as to the positive and universal language of the convention. The exact order of priorities is laid down explicitly, and again contemplates no exceptions. The first two lines of art. 2 run as follows: "Maritime liens shall attach to a vessel, to the freight for the "voyage during which the secured claim arises." Then follow the five categories of maritime liens of which the fourth, so far as relevant to the present appeal, is: "Claims due for collision

(1) 5 P. D. 197. (2) [1922] P. 259.

" or other accidents of navigation, and for damage caused to " works in or about harbours, docks and navigable water-ways." Article 2 runs thus: " Subject to the provisions of this " Convention, liens established by the preceding provisions are " subject to no formality and to no special condition of proof." That language seems to me in terms to exclude the application of any such inhibition as the *Moçambique* rule, but if the letter does not exclude, the spirit certainly does, for the article is a characteristic mandate to the world's admiralty courts that " this is the law which you shall apply." And such a mandate of jurisdiction would appear to be a proper and even necessary attribution to courts whose jurisdiction extends universally over " the high seas," that is, in all foreign ports " where " great ships go."

On the Limitation Convention, agreement was achieved by combining the economic effect of the Continental (and original) system of allowing the shipowner to clear his liabilities by abandoning his ship and freight to his creditors (privileged and unprivileged) with the English system of a maximum money liability dependent on the size of the ship, substituting in effect a conventional value of ship and freight for abandonment; but it is an essential principle of the international concordat that the existing correlation of limitation of liability with maritime liens, inherent in the general law of the sea, should be preserved, so as to ensure that the proceeds of ship and freight, or the fund coming from the statutory payment, should be distributed by the court in strict accord with the rights and priorities of the lien creditors. Adherence to the principle of correlation appears in art. 6 which provides for distribution of the limited fund in strict accordance with the order of ranking of all liens on the ship. Likewise in the requirement of art. 8, namely, that if proceedings are taken against the same ship in courts of different states, its owner shall be entitled to bring to the notice of any such court all the claims, whether " privilégiés " or not, already lodged against him or his ship in all the other courts, so as to ensure that through proceedings being taken in more courts than one, the total limit of his liability shall not be exceeded. In this convention there is again manifest the tacit assumption that the law of the seas shall prevail whatever the national court, and whatever the secured claim (créance privilégiée), and whatever the country where the claim originated. I do not in any way suggest that the contents of the two conventions to which I have more par-

C. A.
1946
THE TOLTEN.
Scott L.J.

ticularly referred, afford any direct logical support for the particular principles of law about English maritime liens which I am expressing in this judgment, but the fact that so many nations with different systems of law have subscribed to those principles, does go some way to showing that those principles are consonant with that "general law of the sea" on which our own admiralty judges have so often relied. At any rate it is satisfactory to note that the conclusions which I have reached as to our admiralty law involve no departure from the terms of international conventions so widely agreed.

I now turn to a more particular examination of the established scope of the jurisdiction enjoyed by our own admiralty courts, to see how far it supports the view I have been expressing. That jurisdiction is mostly original, though to some extent declared or even extended by statute. In my opinion it too is to-day so wide, so self-sufficient and of such a character that in an admiralty "cause of damage" the *Moçambique* rule can have no place, whether the proceeding be in rem or in personam, and even apart from the maritime lien to which the damage gives rise. The *Moçambique* rule is, in short, a conception wholly foreign to the essential nature of admiralty jurisdiction, as shown by its history, judicial and Parliamentary. The limiting rules of the common law about venue were unknown in the Court of Admiralty; and the universality of the world area, over which it administered justice both civil and criminal, affords a striking contrast to the locally restrictive rules of common law jurisdiction. And here again I lay special emphasis on the degree to which, and the frequency with which in admiralty judgments, both original and appellate, considerations of policy such as the interest of maritime commerce, and the world's need of uniformity in maritime law, have played a conscious part in the judicial development of British admiralty law. In *Currie* v. *M'Knight* (*The Dunlossit*) (1), which was an appeal from Scotland, we have an illustration of this source of growth. There the House of Lords affirmed the decision of the Court of Session to the effect that the unauthorized conduct of certain members of the crew of the defendant's ship, in cutting certain mooring ropes of the plaintiff's ship, did not create a maritime lien on the defendant's ship. That point is irrelevant to the present appeal; but Lord Watson, discussing the view taken by the Scottish courts, that in Scottish law there existed no such right as a

(1) [1897] A. C. 97.

maritime lien for damage done by a ship, said (1) : " That such " a conflict should be possible " (that is, between the Scottish and English courts exercising admiralty jurisdiction) " is " inconsistent with . . . . the maritime code which ought " to prevail in both countries, which, in my opinion, is neither " English nor Scottish but British law." In that case the decision of the Privy Council in the *Bold Buccleugh* (2), where it was for the first time definitely decided that there is a maritime lien for damage done by a ship, was categorically approved. Lord Watson also expressly recognized the priority of the maritime lien for damage over the maritime liens for prior salvage and wages claims, and for bottomry bonds. He said (3) : " It is unquestionably within the authority of this " House to reconsider, and if necessary to overrule the judgment " of the Judicial Committee in the *Bold Buccleugh* (2) ; but " it is no less clear that the opinions of the eminent judges who " took part in the decision of that case ought not to be dis- " regarded without good cause shown. To my mind, their " reasoning is satisfactory ; and the result at which they " arrived appears to me to be not only consistent with the " principles of general maritime law, but to rest upon plain " considerations of commercial expediency. The great increase " which has taken place in the number of sea-going ships " propelled by steam power at high rates of speed has multi- " plied to such an extent the risk and occurrence of collisions, " that it has become highly expedient, if not necessary, to " interpret the rules of maritime liability in the manner best " fitted to secure careful and prudent navigation. And in my " opinion it is a reasonable and salutary rule that when a ship " is so carelessly navigated as to occasion injury to other " vessels which are free from blame, the owners of the injured " craft should have a remedy against the corpus of the offending " ship, and should not be restricted to a personal claim against " her owners, who may have no substantial interest in her and " may be without the means of making due compensation." The language of Lord Watson there echoes many previous judicial opinions that British maritime law derives originally, and continues to get inspiration from the general law of the sea prevailing amongst maritime nations ; e.g., of Lord Mansfield who in 1759 said in *Luke* v. *Lyde* (4) " the maritime " law is not the law of a particular country, but the general

(1) [1897] A. C. 105.
(2) 7 Moo. P. C. 267.
(3) [1897] A. C. 106.
(4) (1759) 2 Burr. 882, 887.

C. A.
1946
THE TOLTEN.
Scott L.J.

" law of nations," meaning that admiralty judges should still look for inspiration to the parent source. How wide admiralty jurisdiction was—and except on the criminal side, still remains —is well illustrated by the letters patent appointing Dr. Godolphin Judge of the Admiralty Court in 1658. They appear on pp. 340 to 344 of Burrell's Reports (reprinted in vol. 167 of the English Reports at pp. 600–602). The criminal jurisdiction there described, was all inclusive " upon the high seas and salt " waters and all other places and precincts within or lawfully " belonging to the jurisdiction of the Admiralty of England." The civil jurisdiction was there described under a long series of broad headings containing diverse particular subject-matters under each heading: and ended with the widest possible general words on p. 342 " and also in all other cases and causes " belonging to the Court of Admiralty aforesaid as it may be " requisite or expedient to proceed and take bailes and " recognizances as hath been used and observed in the said " court."

Different phrases have been used, by both admiralty and common law judges and in admiralty documents, to describe the world-wide ambit of admiralty jurisdiction, but none is more all-embracing than the one used most often—" the high " seas." Dr. Lushington used it repeatedly. In the *Sarah* (1), he said: " The court has original jurisdiction, because the " matter complained of is a tort committed on the high seas," and Lord Herschell cited that observation with approval in the *Zeta* (2). But as so used the descriptive phrase " high seas " had no reference to territorial waters or any other concept of public international law. On the contrary, it included as far as the tide reached up rivers. It was for this reason that it became convenient to find a practical boundary. That was afforded by stopping at the first bridge; and in the early days when the law of the sea took shape there were few bridges across the tidal reaches of rivers. Other descriptions emphasizing the extensive signification of the phrase " high seas " are " in " places where great ships go," a geographical term which would reach a long way up most navigable rivers in those days when probably a ship of 300 tons was accounted " great." Another descriptive form of words used by Blackburn J. in *Reg.* v. *Anderson* (3), was " at a place where the tide flows " and below all bridges." These expressions all mean the

(1) Lush. 549.
(2) [1893] A. C. 468, 480.
(3) (1868) L. R. 1. C. C. R. 161, 169.

same thing, although the word "place" imports something visually identifiable and no doubt had reference to places where land and sea meet. As the criminal jurisdiction of the Admiral was co-extensive with his civil jurisdiction, the criminal cases in the Queen's Bench of the last century throw equal light with cases in the admiralty court on the geographical aspect of admiralty jurisdiction. In *Reg.* v. *Carr* (1), the crime charged was a theft from a British ship when lying moored to the quay at Rotterdam in the open river (the Maas) sixteen or eighteen miles from the sea, but in tidal waters and below bridges. At p. 86 Stephen J. said: "The whole question is, was the "theft within the jurisdiction of the Admiralty of England? "Ever since the time of Richard II., its jurisdiction has "extended to where great ships go. Many statutes regulate "procedure for applying that jurisdiction, but the jurisdiction "itself has, in its extent, so far as I can learn, remained "unnarrowed. Of the cases cited, *Rex* v. *Jemot* (2) bears out "that jurisdiction, it shows it is not limited to waters outside "ports. It was a case of an English sailor punished for what "he did on an English ship in port in Cuba. *Rex* v. *Allen* (3) "is to a similar effect. *Reg.* v. *Anderson* (4) again is an authority, "and it goes further, it affects both place and person, for in that "case it was a foreigner who was tried, not a British subject, "but it was a foreigner one of the crew; whilst here we have to "decide, following these authorities, whether jurisdiction extends "to the English ship placed where great ships usually go as "part of their voyage for the purpose of its trading, and to all "persons who happen to be on board such ship, so as to be "entitled to the protection of English law. I see no reason "founded on expediency or authority to induce us to say that a "ship at anchor is within the jurisdiction, and that a ship "moored to the land is not, or to introduce intricacies as "to the mode of attachment of the ship to land, or to inquire "when the flag is lowered or when hoisted. Such rules would "be to make law without meaning, and to narrow well founded "and beneficial jurisdiction. I prefer the obvious and whole-"some principle that jurisdiction and protection in these cases "are co-extensive." The learned judge's reference to crimes committed when the ship was inside a foreign port will be noticed.

(1) (1882) 10 Q. B. D. 76.
(2) Cited Arch. Cr. Pl. 16th ed. 395.
(3) (1837) 1 Mood. 494.
(4) (1868) L. R. 1 C. C. R. 161, 169.

C. A.
1946
THE TOLTEN.
Scott L.J.

The *Mecca* (1) was an admiralty case, likewise concerned with foreign ports. There the Court of Appeal consisting of Lord Halsbury, Lindley and A. L. Smith L.JJ., as a matter of course treated Alexandria and Algiers as being quite obviously both included in the geographical term " high seas." They expressed a doubt about a particular basin in Port Said harbour open to the Canal, but on what ground I am unable to guess, unless it was some reference in the evidence to there being no tide there. If it was, that is a geographical error : for although there is very little tidal rise and fall in any part of the Mediterranean, there is, I believe, the same rise and fall in the Canal at its north end where the basin in question is, as anywhere else in the Mediterranean. But the importance of the decision of this court in the *Mecca* (1) is the unequivocal ruling that wherever the tide does ebb and flow, i.e., wherever ships go, is included within the jurisdiction of our admiralty court. The place where the plaintiffs allege that the *Tolten* was guilty of negligent navigation was in tidal waters, as she was proceeding out to sea. It is therefore clear that so far as locality is concerned our admiralty court had jurisdiction.

Dr. Lushington at one time expressed the view that the Admiralty " cause of damage " was limited in kind to cases of collision between ships ; but that view was erroneous, as demonstrated by Lord Herschell in the *Zeta* (2) the jurisdiction over the high seas was quite general (1.) whenever anywhere on the " high seas " negligent navigation caused damage with or without collision ; (2.) Where claims were made by individuals for personal injuries, similarly caused (though not under Lord Campbell's Act until the Maritime Conventions Act, 1911 conferred the right to sue in rem : and so brought our admiralty law into line on that point with Continental law) : (3.) For damages similarly caused to property other than a ship, whether movable or immovable, as established in the *Veritas* (3). There was never any attempt by the common law courts, even before the Admiralty Court Act, 1840, to prohibit the admiralty court dealing with a " cause of damage " in respect of damages caused in English territorial waters unless the scene lay inside " the body of a county " ; and for this purpose the body of a county ended at low water mark, seawards of that boundary was accepted as the exclusive jurisdiction of the Admiral. Every tort on the high seas was

(1) [1895] P. 95.
(2) [1893] A. C. 480, 482, 485.
(3) [1901] P. 304.

within admiralty jurisdiction. The struggle with the common law courts was not about the kind of claim but about the geographical area of admiralty jurisdiction: and then it was only to keep it outside the body of the county that they fought so hard; but they construed that expression geographically as defined not by the limit of territorial waters or by the fauces terræ, but by the line of low water mark. Whatever doubts Dr. Lushington may have had about the kind of cases within "the jurisdiction" were dispelled by the Act of 1861. The *Malvina* (1) (affirmed in the Privy Council (2)) was a case of collision in the Blackwall Reach of the Thames between a ship and a barge; and the barge sued in rem. To this the defendant ship pleaded "that the barge was not a ship and that the "collision took place within the body of a county." Dr. Lushington struck out the plea and said it was the intention of the Act by s. 7 to give the court jurisdiction.

I have no doubt about the general principle, but illustrations may be helpful. For damage to fixed property see the *Uhla* (3), the *Veritas* (4), and the cases there cited; and the whole trend of Lord Herschell's judgment in the *Zeta* (5). That foreign territorial waters are within the jurisdiction is shown by the *Diana* (6) (locus in quo the Great Holland Canal, two miles from the Nieu Deep): the *Courier* (7) (a collision inside the port of Rio Grande). These two cases were decided by Dr. Lushington on the same day, November 4, 1862. One purpose of the Act of 1840 was to get rid of the common law veto on the exercise of admiralty jurisdiction within the body of a county; but the Act was addressed only to cases of damage "received by ships," probably because damage otherwise than by collision between ships was not in the mind of Parliament. But when the limited scope of the 1840 reform was appreciated, Parliament made it quite clear by the preamble to the Act of 1861 that its object was to enlarge the extension effected by the Act of 1840 still further, and the language was, as Dr. Lushington at once saw, very wide. I agree with Bucknill J. (as he then was) in thinking that it was intentionally wide and that the *Moçambique* rule would be a restriction altogether repugnant to the intention and language of Parliament in those two Acts read together. What Lord Herschell said in the *Zeta* (8), where the ship was claiming for

(1) (1862) Lush. 493, 495.
(2) (1863) Br. & Lush. 57, 58.
(3) L. R. 2 A. & E., 29, note.
(4) [1901] P. 301.
(5) [1893] A. C. 480.
(6) Lush. 539.
(7) Ibid 540.
(8) [1893] A. C. 480, 482, 482.

C. A.
1946
THE TOLTEN.
Scott L.J.

damage done to the ship by the negligence of the Mersey Docks and Harbour Board might well be applied mutatis mutandis to the Act of 1861 and the present appeal. His words were: "The words 'damage received by any ship or sea-going "'vessel' are certainly as wide as could well be conceived, "and, regarding the language of the statute alone, apart from "other considerations, I do not think it would be possible to "entertain a doubt that the present case was within it." If due weight is also given to the whole of the passages on pp. 485-6 about the well-understood meaning of the word damage in the Admiralty Court, it is apparent that a claim against the ship for injuries to a wharf fall within it.

Mr. Devlin relied on the *M. Moxham* (1), as an authority in his favour, but it is not. The only point decided is irrelevant. Owners of harbour works in a Spanish port sued the owners of the ship which was alleged to have caused the damage in an action in rem. The question raised by the defence was based on the ordinary law of tort that, unless the act in question is not only a tort by the law of this country, but is at least wrongful by the law of the country where it is committed, an action does not lie. The defendants alleged that by the law of Spain the owners of a ship are not responsible for its negligent navigation, but only the master and crew. It was on that footing that the defendants succeeded. There was an obiter dictum in that case by James L.J. at p. 108, indicating the possibility of a principle on the lines of the *Moçambique* rule applying, but that question was not argued, and I do not agree with it. It was cited in the *Moçambique* case, but the weight of that citation is much reduced by the absence of any discussion in that case based on the admiralty aspect. In the present case there is naturally enough no averment in the defence that by the law of Lagos the ship is not liable. As a matter of fact as Lagos is within a British colony the relevant law there is almost certainly the same as here. Anyhow it is the duty of the court to make that assumption in the absence of averment and proof to the contrary. Mr. Devlin also relied on the *Parlement Belge* (1), and the *Tervaete* (2), but the only point decided in either of them was that sovereign ownership carries total immunity—not only from legal proceedings but from the attachment of any lien to the property of the foreign sovereign. That rule of public international law relates in

(1) (1876) 1 P. D. 107.
(2) 5 P. D. 197.
(3) [1922] P. 259.

truth to the jurisdiction not of the King's courts but of the King himself. It is territorial and not judicial. One sovereign will not, in peace, exercise power in any way at all over another sovereign whether through his courts or otherwise. It is to that universal rule of comity that the Immunity Convention is mainly addressed ; see Dicey's General Principle No. II. (C.), 5th ed., p. 25 : " English courts will not enforce a right " otherwise duly acquired under the law of a foreign country " . . . . (C.) where the enforcement of such right involves " interference with the authority of a foreign State within the " limits of its territory." But with that principle, on which there is no dispute, it is well to contrast his own summarized commentary at the end of Note No. 11 in his Appendix. It is quite general in scope though following on No. XIV., the last of the claims treated by him as falling within " the list of claims " in respect of which an Admiralty action is maintainable." " (XIV.) *Any claim to enforce a judgment in rem obtained against " a British or foreign ship in a foreign court.* A judgment in " rem is obtained against a ship in a foreign Court of Admiralty " whereby the plaintiff in the foreign action is entitled to recover " 25,000*l.* The judgment not having been satisfied, the ship " comes into an English port. A. the plaintiff in the foreign " action, brings an action in rem against the ship in respect of " the foreign judgment. The court has jurisdiction to entertain " the action. This claim (it is submitted) may be put in a " more general form, and it may be laid down that the court " has jurisdiction to entertain an action in rem for the enforce- " ment of any maritime lien if the case is one in which, accord- " ing to English law, a maritime lien exists." A curious clerical mistake has crept into the 5th edition. The word " no," appears between the two words " has " and " jurisdiction " in the second line of the paragraph which is intended to be quite general. The " no " does not appear in any earlier edition and is obviously an error. Ignoring the error it is interesting to observe the unqualified affirmation of the general principle which that very learned author enunciates. I regard it as an accurate statement of English law about maritime liens intentionally expressed by the author in general terms. He was a great master of the whole subject of Conflict of Laws, and discusses the *Moçambique* case at length in the book. He was far too careful and prudent a writer to omit any relevant qualification when enunciating an absolutely general principle of law, such as the above paragraph.

The appeal was very well argued on both sides. Although

C. A.
1946
THE TOLTEN.
Scott L.J.

interlocutory, it has raised many questions of substantive law of far reaching importance, particularly in the light of the great international movement for the unification of the law of the sea to which I thought it my duty to refer in this judgment. There is a curious absence of direct authority, an absence which of itself throws doubt on the defendants' contention: but in its absence I felt it my duty to explore the maritime field fully, in order to demonstrate the essential incongruity of the *Moçambique* rule with the old established jurisdiction of the admiralty court over all the meeting places of land and sea, where ex hypothesi the question of the *Moçambique* rule might have been raised but never has been. The only possible explanation seems to me to be that the rule is fundamentally foreign to admiralty jurisdiction and has even less application there then it has in equity. My brethren have dealt with its parallel inappropriateness in equity, and it is enough for me to say that I agree with their view.

The appeal must be dismissed with costs.

SOMERVELL L.J. In this case the defendants submit that on the facts set out in the statement of claim there is no jurisdiction in the admiralty court to try this action. The claim is a claim by the owners and occupiers of a wharf in Lagos, Nigeria, for damage to their wharf owing to the defendants' ship having collided with it. The proceedings were initiated by service of a writ in rem. There was, we are told, no arrest, the solicitors undertaking to accept service of the writ. The objection is based on the rule which was considered and applied in *British South Africa Company* v. *The Companhia de Moçambique* (1), which, for brevity, I refer to as the *Moçambique* case. The learned judge decided that the court had jurisdiction. After referring to the conflicting dicta in the *M. Moxham* (2), and the absence of express authority, he based his judgment, in the main, on the unqualified words defining admiralty jurisdiction which are now to be found in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 22, sub-s. 1 (a) (iv.), which are as follows:—" (1.) The High " Court shall, in relation to admiralty matters, have the " following jurisdiction (in this Act referred to as ' admiralty " ' jurisdiction ') that is to say—(a) jurisdiction to hear and " determine any of the following questions or claims:— " (iv.) Any claim for damage done by a ship "; This should

(1) [1893] A. C. 602. (2) 1 P. D. 43, 107.

be read with s. 33, sub-s. 2 : " The admiralty jurisdiction of " the High Court may be exercised either in proceedings in " rem or in proceedings in personam." He did not think that the decision in the *Moçambique* case compelled him to limit the construction of the words in the way contended for by the defendants.

The case was fully and ably argued before us and raises a difficult question of principle which is, in my opinion, uncovered by authority. Mr. Devlin for the defendants submitted that the *Moçambique* case laid down a general principle as summarized in the first sentence of the headnote :—" The Supreme Court " of Judicature has no jurisdiction to entertain an action to " recover damages for a trespass to land situate abroad ; " and that the general words of the Judicature Act must be read subject to this rule, as they must be read subject to the rule against impleading a foreign sovereign, as applied to the arrest of a State ship in the *Parlement Belge* (1). I think there is force in this last point, and feel unable to give as much weight to the part of the argument based on the general words of the Judicature Act as was given, I think, by the learned trial judge, with whose conclusion I agree.

The issues became clear as the case proceeded and were very fully dealt with from the defendants' point of view in Mr. Devlin's reply. It is therefore convenient to pass from the above very abbreviated statement of Mr. Devlin's argument in opening to the three points taken by Mr. Bateson. He submitted in the first place that the rule in the *Moçambique* (2, case ought to be confined to cases in which the issue raised by the claim involved, as in that case, a conflict as to title between plaintiff and defendant. He submitted that the rule was in the main based on the ineffectiveness of orders of the courts of one country purporting to decide questions of title regarding foreign land. He submitted that in actions such as this, where the trespass complained of is clearly not based on the assertion of a title adverse to the plaintiff, neither the principle of ineffectiveness nor any principle of international comity, also referred to in the *Moçambique* case (2), apply.

In my opinion, the House of Lords laid down the rule generally so far as common law actions in personam are concerned. Lord Herschell (3) refers to two cases in which Lord Mansfield entertained and acted on the view that where damages only

(1) 5 P. D. 197.
(2) [1893] A. C. 602.
(3) Ibid. 620, 621.

C. A.
1946
THE TOLTEN.
Somervell L.J.

were sought in respect of a trespass committed abroad an action might be maintained in this country. These cases are referred to by Lord Mansfield in *Mostyn* v. *Fabrigas* (1). Lord Mansfield's decisions were clearly on the basis that no question of title would arise. Lord Herschell says: "The view acted on by "Lord Mansfield in the two cases referred to has not been "followed" and he regarded them as overruled by the Court of King's Bench in *Doulson* v. *Matthews* (2). This may not have been necessary to the decision, as there was a clear conflict of title between the two parties to the *Moçambique* case, but I think that this court should apply the rule as laid down and, in my opinion, this is fatal to Mr. Bateson's first submission.

As the other two points raised by Mr. Bateson to some extent overlap it is convenient to consider them together. The first is that the rule should not be applied to admiralty jurisdiction which has always been wider than the common law jurisdiction, the second that the rule should in any event not apply to claims where there is a maritime lien and that there is a maritime lien in this case. In putting forward these submissions Mr. Bateson, as a basis for his argument, drew attention to the admitted exception to the rule. This exception is based on decisions of the Court of Equity "showing that our courts were ready, "when no technical difficulty of venue stood in the way, to "adjudicate on the title to lands situate abroad." This quotation is from Lord Herschell's speech in the *Moçambique* (3) and it is, to my mind, clear that he accepts the validity of the exception.

In Dicey's Conflict of Laws, 5th ed., p. 207, the first sentence of the "Comment" dealing with this Exception to the rule reads as follows: "The principle on which this exception, "originally derived from the practice of the Court of Chancery, "rests is that, though the court has no jurisdiction to determine "rights over foreign land, yet, where the court has jurisdiction "over a person *from his presence in England*, or now from the "court having jurisdiction to serve him with a writ or notice "thereof, though he is out of England, the court has jurisdiction "to and will, in a fit case and in the exercise of its discretion, "compel him to dispose of or otherwise deal with his interest in "foreign land so as to give effect to obligations which he has "incurred with regard to the land."

It is unnecessary to consider the precise limits of

(1) (1774) 1 Cowp. 161, 180.
(2) 4 T. R. 503.
(3) [1893] A. C. 602, 626.

the exception. Mr. Devlin submitted that it was not really an exception as the rule applies only to real or mixed actions (see the citation from Story's Conflict of Laws in the *Moçambique* case (1)), and that proceedings in equity at any rate are not within those categories. The importance, to my mind, is that the existence of the exception negatives any suggestion that the courts have recognized a general principle that no decisions will be given which may determine or affect rights in or over foreign land. If there were any such principle it would be an end of this case. The plaintiffs have alleged they are the owners and occupiers of the wharf, and that must be taken to be a relevant fact on which the court would pronounce in giving its decision. It does not, however, follow that, because there is one exception, there should be another.

On his second submission, Mr. Bateson relied inter alia on the decision in *The Courier* (2), where it was held that the Court of Admiralty has jurisdiction where there is a collision between foreign vessels in foreign waters. This followed on *The Diana* (3), which dealt with a collision between British ships in foreign inland waters. In both cases the jurisdiction was of course founded on the presence of the res within the jurisdiction. Admiralty jurisdiction is founded on the court's control over the res, as common law jurisdiction is founded primarily on the presence of the defendant. A foreigner defendant present in this country who has committed a wrong abroad against another foreigner may be sued here, if the act complained of is a wrong by the law of both countries, and this is analogous to the case of *The Courier* (2). Even if, however, it were right to say that the general power of the admiralty court acting as it can both in rem and in personam is wider than the common law jurisdiction that would not in itself be a ground for granting a further extension.

Mr. Devlin desired to keep open the point whether a collision with a port or pier situated abroad gave rise to a maritime lien. It was decided in *The Veritas* (4), that damage to a port in British waters gave rise to a maritime lien, and I see no reason for applying any different rule when the damage is to a foreign port.

The ultimate issue in this case is whether a claim in rem in respect of which a maritime lien is exercisable in which the plaintiff claims for damage to foreign land should be treated as

(1) [1893] A. C. 623.
(2) (1862) Lush 541.
(3) Ibid. 539.
(4) [1901] P. 304.

C. A.
1946
THE TOLTEN.
Somervell L.J.

barred by the rule in the *Moçambique* case (1). That rule is said in part to be based on principles of international comity. Speaking broadly, I should have thought that it was in the interests of nations inter se that where damage is done which gives rise to a maritime lien, that lien should be enforceable in the courts of any country to which the ship may proceed. I have assumed, and think I am entitled to assume, that the law of other countries or, at any rate, most other countries is the same as ours on the matter in question here. Does the fact that the plaintiff asserts and, if it is disputed, will have to prove his ownership and occupation of the foreign land which has been damaged, compel one to make an exception to what is as between nations desirable ?

In the *Moçambique* case there was a conflict as to title between plaintiff and defendant. Although, as I have stated, I think the rule as laid down by the House of Lords covers cases where there is no such conflict, it is undoubtedly the dispute as to title between plaintiff and defendant which is the origin of the rule. Here we are dealing with a special procedure, namely, the enforcement of maritime liens by proceedings in rem under admiralty jurisdiction. We are dealing with a class of claim in which any issue as to title is very unlikely, and a dispute as to title, in which the defendant owners of the colliding vessel are themselves claiming the title as against the plaintiff, is so improbable that, in my view, its theoretical possibility can be disregarded. I do not think the conflicting dicta in the *M. Moxham* (2) can be regarded as authority either way. All I wish to say about that case is that if the claim fell under the rule as subsequently laid down in the *Moçambique* case, I doubt whether a mere consent would have entitled the court to entertain the claim. That, however does not arise here. I do not think that what was said in the *Moçambique* case is to be read as covering or being intended to cover an admiralty claim such as the present. The point therefore being uncovered by authority I think that the nature of a maritime lien and the unlikelihood of any dispute as to title arising, lead to the conclusion that the present claim should be allowed to proceed and that the point taken by the defendants is bad in law.

Our decision being based primarily on the existence of a maritime lien and procedure in rem, a question may arise whether s. 33, sub-s. (2.) of the Judicature Act, 1925, applies, so that the court has the same power as in an ordinary case

(1) [1893] A. C. 602. (2) 1 P. D. 43.

which is properly initiated in rem to exercise its jurisdiction in personam. The question was not discussed in argument and is not necessary for the decision, but, in my view, it follows that it would have the same jurisdiction in personam as in other cases where the relevant circumstances were the same.

We were referred to many authorities which were clearly relevant in order that the court should have the matter properly before it. I have not referred to them because in the result the matter seems to me to turn on the principles which I have tried to formulate. I would like to say that I do not think that the principles that have been laid down based on the immunity of sovereigns directly assist in solving the present problem.

It is unnecessary in this case to consider whether claims enforceable in rem against a ship but which do not give rise to a maritime lien should, if they concern foreign land in the same way as the claim here, be entertained. It may be that such a claim is difficult to imagine. All I need say is that, by relying as I do on the existence of the maritime lien I do not intend to imply that the class of claim referred to in this paragraph, if it should arise would necessarily be outside admiralty jurisdiction.

I think the appeal should be dismissed, with costs.

COHEN L.J. (read by SOMERVELL L.J.) On October 13, 1944, the motor vessel *Tolten* while proceeding out of Lagos harbour, Nigeria, collided with and did serious damage to the plaintiffs' wharf. They alleged that such damage was caused by the negligence of the defendants or their servants or agents in charge of the *Tolten* and, on January 23, 1945, the plaintiffs issued a writ in rem in the Admiralty Division claiming damages for such negligence. They delivered their statement of claim on April 27, 1945, and, on June 6, 1945, the defendants delivered their defence, para. 1 of which reads as follows: "The defendants object that on the facts set out in the statement of claim this Honourable Court has no jurisdiction to adjudicate thereon. If the defendants' objection as aforesaid is not upheld, they will rely on the matters hereinafter pleaded." By an order made by the registrar on October 2, 1945, the point of law thus raised was directed to be heard as a preliminary issue. This issue came before Bucknill J. (as he then was). On December 3, 1945, he delivered a reserved judgment holding that the court had jurisdiction to try the action and dismissing the defendants' objection with costs. The learned judge

C. A.
1946
THE TOLTEN.
Cohen L.J.

based his judgment on the ground (1.) that s. 22 of the Supreme Court of Judicature (Consolidation) Act, 1925, re-enacting in effect s. 7 of the Admiralty Court Act, 1861, provided that the High Court shall have in relation to admiralty matters, jurisdiction to hear and determine among other questions: (iv.) any claim for damage by a ship; and (2.) that these words were clear and simple and must be given the widest possible interpretation. Mr. Devlin, however, contended that the words of the statute must be construed in the light of the general rules determining the limits of the jurisdiction of the courts of this country, and, that one of such rules is that the court has no jurisdiction to entertain an action for the recovery of damages for trespass to an immovable situate out of England. He says that this rule is clearly laid down by the House of Lords in *The British South Africa Company* v. *The Companhia de Moçambique* (1) and that it applies in all cases and not merely where title to the immovable is in dispute. In support of this last contention he relies on *Municipal Council of Sydney* v. *Bull* (2). This case undoubtedly supports his contention, but it does not bind us. I must therefore consider whether the decision of the House of Lords necessarily leads to the conclusion that *Municipal Council of Sydney* v. *Bull* (2) was rightly decided. The point did not directly arise in the *Moçambique* case (1) as the title was clearly in dispute but I think that a perusal of the speeches of Lord Herschell and Lord Halsbury show that their view was, that in common law actions for trespass, if the trespass was to land outside England, the plaintiff would be nonsuited whether or not the title was in dispute. This was clearly Lord Halsbury's opinion, for he says (3): "But wherever the place was material as the "unvarying current of authorities establishes that it was "in all controversies relating to land, the defendant might "traverse the place, and, even if he did not, if it appeared in "proof that the place was out of England, the plaintiff was "nonsuited." Lord Herschell in dealing with two decisions of Lord Mansfield where that learned Lord had exercised jurisdiction in cases of trespass to land outside England did say "Nor am I satisfied that either Lord Mansfield or Story would "have regarded an action of trespass to land as a suit for "personal damages only, if the title to the land were in issue, "and in order to determine whether there was a right to

(1) [1893] A. C. 602.
(2) [1909] 1 K. B. 7.
(3) [1893] A. C. 632.

" damages it was necessary for the court to adjudicate upon " the conflicting claims of the parties to real estate. In both " the cases before Lord Mansfield, as I understand them, no " question of title to real property was in issue. The sole " controversy was whether the British officers sued were, under " the circumstances, justified in interfering with the plaintiffs " in their enjoyment of it." But I do not think he was thereby approving Lord Mansfield's decisions, for at p. 621, he had pointed out that they had not been followed, that they had been cited in *Doulson* v. *Matthews* (1), that in the case last cited an action had been held not to lie and that *Doulson* v. *Matthews* (1) had ever since been regarded as law. Lord Herschell's reasoning as a whole seems to me only consistent with the view more definitely expressed by Lord Halsbury.

I must therefore proceed on the basis that at common law no action for trespass to land outside England would be entertained, but as is recognized by Lord Herschell at p. 626 courts of equity have not hesitated to adjudicate on title of land situate abroad where they would act on the conscience of persons living here. The class of cases in which they will do so is defined by Parker J., as he then was, in *Deschamps* v. *Miller* (2), as follows: " I think it will be found that they " all depend on the existence between the parties to the suit " of some personal obligation arising out of contract or implied " contract, fiduciary relationship or fraud, or other conduct " which, in the view of a Court of Equity in this country, would " be unconscionable, and do not depend for their existence on " the law of the locus of the immovable property." The rule relied on by Mr. Devlin is not therefore absolutely binding on all the courts of the country and Mr. Bateson suggests that another exception is to be found in the case of actions in rem for damage to property abroad caused by ships.

Two alternative grounds for the decision in *The British South Africa Company* v. *The Companhia de Moçambique* (3) have been suggested (1.) that the court will not make an order which it cannot make effective, and (2.) that the comity of nations requires that our courts shall not adjudicate in cases where the title to foreign land might be an issue. In my opinion neither of these grounds precludes us from upholding the decision of

(1) 4 T. R. 503.
(2) [1908] 1 Ch. 856, 863.
(3) [1893] A. C. 602.

C. A.
1946
THE TOLTEN.
Cohen L.J.

Bucknill J. On the facts of the present case it could not be said that a judgment if given would be ineffective and if the court is to refuse to exercise jurisdiction it must, I think, be on the ground that to do so would be against the comity of nations. Can it be against the comity of nations that the admiralty court should entertain an action at the instance of a person claiming to be the owner of foreign land for damage done to that land by a ship? Such jurisdiction is based on the presence within the jurisdiction of the offending ship. The accident (subject to an exception to which I will refer later) creates a right of property known as a maritime lien in favour of the owners of the property, be it a ship as in the case of the *Bold Buccleugh* (1), or a wharf in England as in the case of the *Veritas* (2). Maritime liens are recognized in the legal systems of most countries, and I can see nothing inconsistent with the comity of nations in the Admiralty Division of this court holding that a maritime lien arises in favour of the owner of land situate outside the jurisdiction.

Mr. Devlin says that such a conclusion is inconsistent with the principle of the decision of this court in the *Tervaete* (3), which, he says, shows that there can be no maritime lien in favour of the owner of land situate out of the jurisdiction. In that case it was held "Damage occasioned by collision with "a foreign state-owned vessel does not impose a maritime "lien upon the vessel, and if the vessel be subsequently sold "into private ownership she is not then liable to arrest in an "action in rem." The basis of that decision seems to me to be that the recognition of a maritime lien would affect the property of a foreign sovereign (see per Bankes L.J. and per Scrutton L.J. (4)). I can see nothing in that decision to justify us in holding that a lien cannot be created in favour of the owner of foreign land by the action of a ship not the property of a foreign sovereign.

On the whole I think the comity of nations requires that the Admiralty Division of this court should recognize and enforce a maritime lien in favour of the owner of land situate abroad, for, if not, and the ship were arrested here, the owner of the foreign land might find himself postponed to the owner of an English ship injured in the same accident or to claims enforceable in rem but not protected by a maritime lien.

(1) 7 Moo. P. C. 267.
(2) [1901] P. 304.
(3) [1922] P. 259.
(4) Ibid. 266, 272.

For these reasons I agree that the appeal should be dismissed with costs. C. A. 1946 THE TOLTEN.

Appeal dismissed.

Solicitors for the plaintiffs: *Lightbounds, Jones & Co.*
Solicitors for the defendants: *Wm. A. Crump & Son.*

H. G.

IN THE GOODS OF HENRY HORNBY, DECD.

1946 *Mar.* 28. Wallington J.

Probate—Will—Signature in space marked out among dispositive words—Admissibility to Probate—Wills Act, 1837 (7 *Will.* 4 & 1 *Vict.*, *c.* 26), *s.* 9—*Wills Act Amendment Act*, 1852 (15 & 16 *Vict.*, *c.* 24), *s.* 1.

The signature to a will was placed by the deceased in an oblong space drawn on the right-hand side of the sheet on which the will was written out and among the dispositive words, some of which accordingly appeared above it and some below. The text of the will which, with the word "signed" standing above the signature in the space, was in the same handwriting as the signature and was all in the same ink, which was not that of the signature, continued without interruption past, and down the left-hand or inner edge of, the oblong space, otherwise covering the full width of the paper. The signatures of the testator and the attesting witnesses were all written in the same ink, which was different from that used for the rest of the document. On a motion to admit the will to probate, the judge found as a fact that the oblong space was deliberately left, at the time of the writing out of the document, with the intention that the testator's signature should be placed in it:—

Held, that the intention, thus shown in advance, to sign in the space specially reserved indicated an intention that the signature so placed should authenticate the whole document, and that that signature accordingly "made it apparent on the face of the will "that the testator intended to give effect" by it "to the writing "signed as his will" within the meaning of s. 1 of the Wills Act Amendment Act, 1852 (1). For the words in that section "and the

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

(1) By s. 9 of the Wills Act, 1837: ". . . . No will shall be "valid unless it shall be in writing "and executed in manner herein- "after mentioned; (that is to say), "it shall be signed at the foot or "end thereof by the testator, or by "some other person in his presence "and by his direction; and such "signature shall be made or "acknowledged by the testator in "the presence of two or more "witnesses present at the same "time, and such witnesses shall "attest and shall subscribe the will "in the presence of the testator, "but no form of attestation shall "be necessary."

By s. 1 of the Wills Act Amendment Act, 1852: ". . . . every

1946

IN THE GOODS OF HENRY HORNBY, DECD.

" enumeration of the above circumstances shall not restrict the " generality of the above enactment " preserved intact the overriding duty of the court, notwithstanding that the section specified certain circumstances attending the position of the signature which should not be held to invalidate the document, to consider whether the signature, whatever its position, was so placed as to indicate the testator's intention to give effect by it to the document.

MOTION.

The testator, Henry Hornby, died leaving by way of will a document dated September 16, 1919, disposing of his estate amounting to some 24,000*l*. The document was written on one side of the paper and, as to the dispositive part, in the same handwriting as that of the testator's signature. At the bottom of the sheet, on the left-hand side, the testator wrote only the words " witness to my signature," without completing the testimonium, and opposite those words appeared the signatures of the witnesses, both of whom had since died. The testator's signature, however, written in ink the same as that used by the witnesses for their signatures but different from that used for the rest of the will, including the word " Signed " above the signature, was placed in an oblong space about half-way down the sheet on the right, the upper and lower horizontal edges and the left-hand vertical edge being drawn, and the right-hand vertical edge being formed by the edge of the paper. Above his signature in that space the testator had written the word " Signed." The text of the document was not interrupted by the oblong space and some of the dispositive words were

" will shall, so far only as regards
" the position of the signature of
" the testator . . . . be deemed
" to be valid within the said enact-
" ment, as explained by this Act,
" if the signature shall be so placed
" at or after, or following, or under,
" or beside, or opposite to the end
" of the will, that it shall be
" apparent on the face of the will
" that the testator intended to give
" effect by such his signature to
" the writing signed as his will,
" and . . . . no such will shall be
" affected by the circumstance
" that the signature shall not
" follow or be immediately after
" the foot or end of the will, or by
" the circumstance that a blank
" space shall intervene between the
" concluding word of the will and
" the signature, or by the circum-
" stance that the signature shall
" be placed among the words of
" the testimonium clause or of the
" clause of attestation, or shall
" follow or be after or under the
" clause of attestation, either with
" or without a blank space inter-
" vening, or shall follow or be after,
" or under, or beside the names or
" one of the names of the sub-
" scribing witnesses . . . . and the
" enumeration of the above cir-
" cumstances shall not restrict the
" generality of the above enact-
" ment . . . . "

1946

IN THE GOODS OF HENRY HORNBY, DECD.

accordingly above and level with it and others below it as shown below :

This is the last will and testament of HENRY HORNBY .....

.....

I bequeath [specified bequests to named relatives] .....

.....

.....

.....

The remainder I leave to be divided equally between [named relatives] ..... MURIEL HORNBY 500*l.* each .....

Signed

HENRY HORNBY.

.....

.....

.....

.....

I appoint as my executors.....

.....

.....

.....

As witness my hand, this sixteenth day of September, nineteen hundred and nineteen.

Witness to my Signature [Witnesses' Signatures.]

No evidence was available as to the circumstances in which the will came to be signed. This motion by the executors to have the document admitted to probate was opposed by the testator's brother, Francis Hornby, on the ground that the signature of the testator was not at the foot of the will.

Victor Williams for the executors. Consideration of s. 1 of the Wills Act Amendment Act, 1852, which mitigates the strictness of s. 9 of the Wills Act, 1837, makes it clear that this document sufficiently complies with the statutory requirements to be qualified for probate as being properly executed. While the testator's reasons for placing his signature in such an unusual position must, in the absence of evidence on the matter, remain subjects of speculation, there is every indication that the oblong space was deliberately left for the signature, and so left at the same time as the rest of the document was prepared,

1946

IN THE GOODS OF HENRY HORNBY, DECD.

for the text runs continuously down past the space. Those circumstances make it apparent that the testator intended to give effect to the document by his signature within the meaning of s. 1 of the Act of 1852, and it is submitted that *In the goods of Roberts* (1) is an authority supporting that contention.

William Latey for the testator's brother. The essential difference between this and most of the cases in which the court has held that an unorthodox position of the testator's signature did not invalidate a will is that in those cases there was some evidence about what actually happened at the time of the execution. No such evidence is available here, the attesting witnesses being dead, to throw any light on the circumstances in which the will was prepared or signed. The only indications of that kind appear on the face of the document. *In the goods of Coombs* (2), *In the goods of Ainsworth* (3), *In the goods of Dilkes* (4), and other similar cases have been uncontested motions, the decisions on which cannot carry so much weight as decisions in contested matters. Admittedly, in *In the goods of Roberts* (1), a consent motion, the President delivered a carefully considered judgment on this topic, but he had before him evidence of due execution and attestation. Reliance may be placed, in opposition to this motion, on *Sweetland* v. *Sweetland* (5), *Margary* v. *Robinson* (6), and *In re Stalman* (7). Examination of the document in the present case seems to show that the testator wrote out the pecuniary legacies and then put his signature. At some later date he began writing further dispositions, including the appointment of executors, legacies to them, and a residuary clause. Thus, even if the words above the level of the testator's signature are admissible to probate, the words below that level must surely be excluded by the prohibition in the last sentence of s. 1 of the Act of 1852.

WALLINGTON J. [after referring to the facts:] Before a document can be admitted to probate it has to be a testamentary document, complying with the requirements of the statutes relating to the bringing into existence of such documents. The deceased's brother under the document in question is interested to the extent of a legacy of 1,000*l.* and in part of the residue, but he would be interested to a much

(1) [1934] P. 102.
(2) (1866) L. R. 1 P. & D. 302.
(3) (1870) L. R. 2 P. & D. 151.
(4) (1874) L. R. 3 P. & D. 164.
(5) (1865) 4 Sw. & Tr. 6.
(6) (1886) 12 P. D. 8.
(7) (1931) 145 L. T. 339.

larger extent if there were an intestacy. Counsel on his behalf submits (and he supports his submission by forceful arguments and reference to a number of cases) that the document is not entitled to probate because it is not signed at the foot or end thereof, as required by s. 9 of the Wills Act, 1837, as amended by s. 1 of the Wills Act Amendment Act, 1852. Counsel for the executors, on the other hand, submits that this document is properly executed because it complies with the conditions prescribed by the enlarging enactment, s. 1 of the Act of 1852, and he relies for some, though not complete, assistance, on *In the goods of Roberts* (1).

Counsel for the testator's brother further suggests that I ought not to pay too much attention, though he does not go so far as to say that I ought to pay no attention, to any cases where there was consent to the admission of the document to probate. I agree with him but only to this extent : that it is manifestly useful to the court to have the assistance of counsel in considering both facts and law in any matter, particularly one so technical as that before me. The assistance of counsel in such cases is not, however, by any means essential, nor is the court, owing to absence of opposition, excused from the duty of going carefully into the whole of the circumstances as well as the law, and of satisfying itself, before making an order admitting a document to probate or refusing probate, that the law has or has not been complied with. It is plain that in *In the goods of Roberts* (1) the President considered the matter as fully as if there had been a reasoned opposition to the admission to probate of the document before him. Similarly, here, having had the assistance of the arguments of both counsel, I must, before deciding to give effect to the arguments of learned counsel for the executors, satisfy myself that this document ought to be admitted to probate because it accords in fact and in law with the requirements of the statutes.

I am absolved from considering the omission of the full testimonium, because counsel for the testator's brother has confined himself to comments on that, and does not raise any question on the form of the testimonium or on the position in which the witnesses' signatures appear. The signature placed in the oblong space as described above is the only signature which can be relied on by the executors as complying with the statutory requirements relating to the position of the signature. If that signature is not within the statutes then this document

(1) [1934] P. 102.

1946

IN THE GOODS OF HENRY HORNBY, DECD.

Wallington J.

cannot be admitted to probate as a whole, though it might be (as counsel for the testator's brother concedes), that that part of it which is above the signature, that is to say, higher up on the sheet of paper than the point at which the signature appears, might be admitted to probate, namely, the part which extends down to the words "Muriel Hornby 500*l.* each," the remainder of the document being non-testamentary and not provable as a will.

The question, therefore, is, whether this signature complies, in this position, with s. 9 of the Wills Act, 1837, and s. 1 of the Wills Act Amendment Act, 1852. If it does it must be admitted to probate as a whole; otherwise, only part of it can be admitted. [His Lordship read s. 9 of the Act of 1837, and continued:] It is the latter words of that section which caused counsel for the testator's brother not to allege invalidity in the attestation, but the material words for the purposes of this motion are "it shall be signed at the foot or end thereof by the testator." The requirements of that section have been modified or explained or, to some extent, mitigated by s. 1. of the amending Act 1852. [His Lordship read the section:] In my opinion the words "if the signature shall be so placed . . . . "beside, or opposite to the end of the will, that it shall be "apparent on the face of the will that the testator intended "to give effect by such his signature to the writing signed as "his will" mean, not that it does not matter where the signature appears, but that the court has to decide (1.) what, in the particular case, is the end of the will, and (2.) whether the document, with the signature where it is, makes it "apparent on the face of the will that the testator intended to "give effect by such his signature to the writing signed as his "will." In one sense the end of the will might be said to be the word "nineteen" in the words "this sixteenth day of "September nineteen hundred and nineteen." That, however, raises the question what was the object of the deceased in apparently reserving the oblong space on the right-hand side of the sheet and higher up on it than some of the words of the document. As was said in argument, it is possible to enter into a bewildering variety of speculations as to how this came about, and I do not think that it would serve any useful purpose to do so. The outstanding facts are that the deceased has written the whole of the words of the will in his own handwriting, quite plainly,

1946

IN THE GOODS OF HENRY HORNBY, DECD.

Wallington J.

and in an ink nearer to green than to any other colour, for it is not a very good green, and that inside the oblong space he has written, in the same ink and apparently at the same time, the word "Signed." It is plain to my mind that he must have had some serious motive in drawing the oblong space. The words written on the left-hand side of it are "equally between my sister Sarah Goulden her two daughters "Lilian and Connie Goulden and to my sister." There follow on, at a level lower than the lower line of the oblong space, "Annie this latter request being" and so on. Thus the words of the document run straight on, as if they had been prepared at the same time, written at the same time and intended to be signed at the same time. It cannot have been, therefore, that the testator thought, after writing out the whole document, that that would be a convenient and prominent place at which to append his signature; it looks to me as if it must have been thought of by him before he had finished writing the document, and that he intended to sign it as his will in that oblong space which he had prepared beforehand.

The next facts of importance are that in a different ink, either at a different time or in a different room, the deceased has written his name as his signature in that oblong space, and that the two witnesses, in the same ink, at the foot of the paper, have written their names as witnesses, one of them specifying the branch of the bank at which presumably he worked. If intention to sign the will in that place has any significance for the purposes of s. 1 of the amending Act of 1856, I find that there is no doubt that Henry Hornby intended that signature sufficiently to authenticate the whole of the document written on that side of the sheet of paper.

Section 1 of the Act of 1852 continues, "no "such will shall be affected by the circumstance that "the signature shall not follow or be immediately after "the foot or end of the will." It is quite possible to put a meaning on those words inimical to some extent to the executors' claim to probate in respect of this document; but, to take the plain meaning of those words, it seems to me that this signature does not follow, and is not immediately after the foot or end of the will. That sentence of the section, in its literal meaning, would seem to indicate that this document is not invalidated because the signature is not at the foot or end of it; nor is it to be affected, so the section continues: "by the circumstance that a blank space shall

1946

IN THE GOODS OF HENRY HORNBY, DECD.

Wallington J.

" intervene between the concluding word of the will and the " signature, or by the circumstance that the signature shall be " placed among the words of the testimonium clause or of the " clause of attestation, or shall follow or be after or under the " clause of attestation, either with or without a blank space " intervening . . . and the enumeration of the above " circumstances shall not restrict the generality of the above " enactment." Some effect must be given to those last words, and their meaning must quite plainly be that the fact that the section specifies certain possible peculiarities in documents is not to affect the principle that the court must consider whether the signature, wherever it is, is so placed that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will.

The section continues: " No signature under the said Act or " this Act shall be operative to give effect to any disposition " or direction which is underneath or which follows it." Those words are relevant only to the question whether, in case I should have to hold that this signature is ineffective as to what is written below it, it is effective as to what is written above it.

The facts in the cases on which Mr. Latey relied differ, in my opinion, materially from the facts in this case. They were: *Margary* v. *Robinson* (1), *Sweetland* v. *Sweetland* (2), and *In re Stalman* (3). Each of those cases is interesting on its own facts, but none assists in the decision of this matter. *In the goods of Roberts* (4) is the nearest to the present case on the facts, though they are so fundamentally different that it cannot be relied on as in any way decisive of the present question. The learned President in his judgment did lay stress on the first sentence of s. 1 of the Wills Act Amendment Act, 1852. The sheet of paper upon which the will there was written was full before any signature or attestation clause could be appended, and either there was not room enough at the end of the sheet to provide for signature and attestation or it was thought more convenient that the signature and attestation should be in the margin. The signature of the deceased was placed in the same position in relation to the attesting witnesses' signatures as that in which it would have been if it had been at the end of the will, that is to say, written along the left-hand margin of the paper at right angles to the text, parallel with the edge, and was to the

(1) 12 P. D. 8.
(2) 4 Sw. & Tr. 6.
(3) 145 L. T. 339.
(4) [1934] P. 102.

1946

IN THE GOODS OF HENRY HORNBY, DECD.

Wallington J.

right while the signatures of the witnesses were to the left, as would have been the case had the signatures all been at the end. The question there was, as it is here, whether the signature was at the foot or end of the will. Plainly there, without reference to s. 1 of the Amendment Act, of 1852, the signature could not be said to be at the foot or end. It was nearer to the top than the bottom, and certainly much nearer to the beginning than to the end. Merriman P., however, found that that document complied with the two statutes. Discussing *In the goods of Coombs* (1), he said (2): "Lord Penzance gave effect to the signature and I "cannot see any difference in principle here. So far as the "position of the attestation clause is concerned it could not "have been at any point which was more nearly opposite or "beside the end of the will"; (the important words are these:) "and having regard to the fact that the whole writing is at "right angles to the operative part of the will I think that I am "justified in holding that the signature was so placed beside "or opposite to the end of the will, that it is apparent on the "face of the will that the testator intended to give effect by "such signature to the writing signed as his will."

If I were to apply those words literally to the present case, the executors' case would fail, because it cannot be said in strictness that this signature of the testator is "so placed "beside or opposite the end of the will," and so on. The category of cases to which s. 1 of the Act of 1852 can be applied have certainly not so far been exhausted. There must always be a variety of signatures that will have to be, and will be capable of being, brought within the ambit of the statute because of the many varieties of testator and the many varieties of conduct in relation to testamentary documents that will arise from time to time for consideration, as they have arisen in the past.

It is for these reasons that I must regard this signature as being, in the intention of the testator, at the end of the will. I have no doubt that when he made this document he prepared that space because he thought that it would be more convenient to have his signature in that position or that the end of the will might very likely be just there or that the sheet would be full so that the end of the will would come in the space where the signatures should be. In my opinion, he so signed it with the intention of making it apparent on the face of the will that he intended to give effect by that signature to the writing signed

(1) L. R. 1 P. & D. 302. (2) [1934] P. 106.

1946

IN THE GOODS OF HENRY HORNBY, DECD.

as his will. For these reasons I come to the conclusion that the whole of this document is a valid and properly executed testamentary document, and I admit it to probate.

Will admitted to probate.

Solicitors for executors: *Gregory, Rowcliffe & Co., for Pickering & Pickering, Stafford.*

Solicitors for deceased's brother: *Gibson & Weldon, for Lloyd & Leake, Shifnal.*

1946

Feb. 19.

Pilcher J.

TWENEY *v.* TWENEY.

Divorce—Validity of marriage—Desertion—Disappearance of first husband—Inquiries proving fruitless—Remarriage after lapse of ten years—Desertion by second husband—Presumption of validity as to second marriage.

A marriage performed with all proper formalities and duly consummated should be presumed valid until some evidence is given which leads the court to doubt that fact.

The petitioner's first husband disappeared and despite exhaustive inquiries no news was ever received of him. Ten years later the petitioner married the respondent, describing herself as a widow on the marriage certificate. She informed the registrar and the respondent of the circumstances of her first marriage. Her marriage to the respondent was conducted with all proper formalities and the parties cohabited together. Subsequently the respondent deserted the petitioner and she petitioned for a divorce on the ground of his desertion:—

Held, that the petitioner's second marriage would be presumed a valid marriage until some evidence was adduced which would lead the court to believe the contrary, and on the facts she was entitled to a decree **nisi** against the respondent.

Spurgeon v. *Spurgeon* (1930) 46 T. L. R. 396 followed.

WIFE'S PETITION FOR DIVORCE.

The petitioner, Doris Francis May Tweney was originally married to one Austin, on December 26, 1920. He left her six months after the marriage (taking with him the petitioner's infant daughter by that marriage). Both Austin and his entire family disappeared and the petitioner never saw him again, and despite exhaustive inquiries between 1922 and 1932 she had been unable to obtain any information about him.

On March 19, 1932, the petitioner married the respondent,

1946

TWENEY v. TWENEY.

Sidney Francis St. Helier Tweney; she described herself as a widow on the marriage certificate. Before the marriage she informed both respondent and the registrar of all the circumstances regarding her first marriage. The second marriage was attended by all proper formalities and the parties afterwards cohabited together.

By this petition, the petitioner asked for the dissolution of her marriage with the respondent on the ground that he had deserted her without cause for three years immediately preceding the presentation of the petition.

About 1941 the respondent had also had inquiries made about the petitioner's first husband, but these proved equally fruitless.

Wynn Werninck (for the petitioner). The petitioner's second marriage should be presumed to have been validly contracted until the contrary be proved, there is the evidence of the marriage certificate, of the fact that the marriage ceremony was duly performed and that the parties cohabited together. At the time of the second marriage the petitioner had no means of knowing whether her first husband was really dead or not; she made exhaustive inquiries which were unavailing. In the case of *Spurgeon* v. *Spurgeon* (1) the facts were similar to this case and Bateson J. made a decree nisi. [Counsel also referred to *Parkinson* v. *Parkinson* (2).]

F. H. Lawton was amicus curiæ on behalf of the respondent. The respondent took advice whether he could proceed on the basis that the second marriage was a nullity, on the ground that petitioner was not a widow at the time of her marriage to him. He had very full inquiries made, but obtained no information of the petitioner's first husband. Section 8 of the Matrimonial Causes Act, 1937, was not meant to apply to a case like the present one, it was directed to protecting a woman whose first husband had disappeared and who wished to remarry.

PILCHER J. having stated the facts, continued: This case originally came before me over a year ago in a long list of undefended cases and, as it seemed to me to require further argument, I adjourned the case. The respondent, although he has not applied for leave to enter an appearance out of time, greatly to everyone's advantage instructed solicitors and Mr. Lawton attended in court to watch the proceedings on the

(1) (1930) 46 T. L. R. 396. (2) [1939] P. 346.

1946

TWENEY
v.
TWENEY.

Pilcher J.

respondent's behalf. At my request he addressed me as amicus curiæ. Having listened to the facts the petitioner has been able to give me, I am satisfied that she was deserted by her second husband and that the desertion took place round about February, 1941, that is to say, more than three years before the presentation of the present petition. She is therefore entitled to a decree on the facts which she has proved with regard to the present respondent's conduct, subject to the following point. I felt at one moment some doubt whether it was proper, in a case where the petitioner frankly gets into the witness box and says " I do not know whether my first husband " is alive or dead, and not knowing that I contracted a second " marriage which I now ask you to dissolve," to grant a decree. I had some doubts whether her proper course would not have been to present a petition under s. 8 of the Matrimonial Causes Act, 1937, asking for a decree against her first husband on the ground that his death was to be presumed. The effect of such a decree would be that the second marriage, contracted as it was in 1932, would have been a nullity and there would have been no necessity for these proceedings. However, having had the advantage of hearing the arguments which have been addressed to me and having looked at such rather meagre authority as there appears to be on the subject, I am satisfied that on the facts of the present case the petitioner is entitled to the decree she asks for against the present respondent. I think the way in which it was put by Mr. Werninck and by Mr. Lawton is the way the matter should be regarded, namely, that the petitioner's marriage to the present respondent being unexceptionable in form and duly consummated remains a good marriage until some evidence is adduced that the marriage was, in fact, a nullity. The position with regard to the evidence is that I am satisfied that the petitioner herself during the years which intervened between the time when she was deserted by her first husband and the time she married her second husband made every reasonable effort to ascertain the whereabouts of her first husband. I am satisfied that those efforts were all unsuccessful. I am also satisfied that for his own purposes the present respondent being anxious to free himself from the bonds of matrimony in the year 1941 on his own account employed an inquiry agent and that that inquiry agent made the most exhaustive inquiries in order to ascertain whether or not any news, good or bad, could be obtained in regard to the first husband Austin. He seems to have con-

1946

TWENEY v. TWENEY.

Pilcher J.

ducted his task with great diligence and considerable intelligence but all the efforts made proved abortive. t is a case in which both sides have done their best to get news of the first deserting spouse and have failed to do so. Austin, if alive, would now be aged about forty-eight and it is quite possible that, being a seaman, he may now be dead.

The only point which I have to decide is whether this was a good marriage. There is no question that the marriage between the petitioner and respondent was attended by all proper formalities. I think that this court ought to regard the petitioner, who comes before it and gives evidence of a validly contracted marriage, as a married woman, until some evidence is given which leads the court to doubt that fact. In this connexion I refer to the case of *Parkinson* v. *Parkinson* (1), decided by Bucknill J., and to the summary of the argument in that case advanced by Mr. Latey. I have less hesitation in arriving at the conclusion at which I do because in the case of *Spurgeon* v. *Spurgeon* (2), on very much the same facts Bateson J. came to the same conclusion, though without giving any reasons for his decision. That, therefore, concludes the matter and the petitioner is entitled to the decree nisi which she seeks.

Decree nisi granted.

Solicitor: *F. W. Perkins.*

(1) [1939] P. 346. (2) 46 T. L. R. 396.

I. G. R. M.

IN THE ESTATE OF G., DECD., M. *v.* L. AND OTHERS.

1946

Feb. 20.

Willmer J.

Probate—Pleading—Action setting up will—Plea by defendant that death of deceased due to felonious act of plaintiff—Plaintiff not prosecuted for felony—Summons to strike out plea—Whether relevant—Whether plea maintainable in civil action.

Whatever restrictions there may be on the right of a plaintiff to found a claim on the alleged felony of the defendant, there is no principle which prevents a defendant from alleging that the plaintiff's claim is vitiated by the plaintiff's own felony: for it is in the public interest that where a plaintiff seeks to set up a claim arising out of his own felonious act the defendant should invoke the rule of law that no man shall be allowed to have recourse to a court of law to obtain a benefit from his own crime.

In an action by a plaintiff setting up a will which appointed no executor but merely purported to give the whole of the property

1946

IN THE ESTATE OF G., DECD.
M.
v.
L.

of the deceased to the plaintiff, the defendants pleaded (inter alia) that the death of the deceased was due to the felonious act of the plaintiff. On a summons by the plaintiff for an order that the plea be struck out on the grounds that it was irrelevant and that the charge was not maintainable in a civil court having regard to the fact that the plaintiff had not been prosecuted for the alleged felony :—

Held, that (1.) the plea was relevant, for if it were established, the plaintiff could take no benefit under the will and would have no interest in asserting its validity and his action to establish it would in effect amount to an abuse of the process of the court, and (2.) the charge was maintainable, though no steps had been taken to prosecute the plaintiff, for, first, neither of the defendants was the party injured by the felony and neither was under any duty to prosecute the plaintiff, and secondly, the defendants were basing no claim on the alleged felony.

SUMMONS ADJOURNED INTO COURT.

This was an appeal from the order of the registrar striking out para. 1 of the defence to a probate action and the substance of the case thereunder. The plaintiff claimed to have the will of deceased established, under which he (the plaintiff) was the sole residuary legatee and devisee. The allegation in para. 1 of the defence was that the plaintiff had feloniously caused the death of the deceased, and could not take any benefit under the will or propound the will.

Cloutman and *Shaw* for the defendants. Paragraph 1 of the defence should not have been struck out, it is not irrelevant, it goes to the root of the case ; if the plaintiff's felony is proved his whole cause of action must fail, as he would clearly be unable to take any benefit under the will. It is well settled law that no-one should be allowed to have recourse to a court of justice to claim a benefit from his own crime : *Beresford* v. *Royal Insurance Co.* (1) ; *Cleaver* v. *Mutual Reserve Fund Life Association* (2) ; *Crippen's* case (3). In *Hall* v. *Knight and Baxter* (4) a party claiming as a legatee was struck out on proof that she had been guilty of manslaughter of the deceased. The other ground for striking out was that the plaintiff had not been prosecuted for the alleged felony ; the rule that a plaintiff cannot bring a civil action against the defendant in respect of the defendant's felonious act until the latter has been prosecuted, does not apply to this case, as the defendants who

(1) [1938] A. C. 586.
(2) [1892] 1 Q. B. 147.
(3) [1911] P. 108.
(4) [1914] P. 1.

1946

IN THE ESTATE OF G., DECD.
M.
v.
L.

are making the allegation were not the persons injured, and there is no greater duty on them to prosecute than on any one else : *Osborn* v. *Gillett* (1), *Appleby* v. *Franklin* (2). *Smith and Wife* v. *Selwyn* (3) is distinguishable as in that case one of the plaintiffs was injured by the felonious act, and further as Kennedy L.J., pointed out it might be that, if any real distinction could be made, the other plaintiff could maintain his claim on the ground that the felonious act was not committed on him. Moreover, there is no rule that prevents a defendant alleging that the plaintiff's claim is vitiated by his felony.

Latey and *J. B. Gardner* for the plaintiff. The allegations in para. 1 of the defence are irrelevant and the registrar was right in striking them out under R. S. C. Or. 25, r. 4. A probate action is not the correct occasion nor is this court a suitable tribunal to try questions of criminal law. Even if the allegations were proved to be true, it would not affect the plaintiff's right to have the will set up. It has been held that a convicted criminal may act as executor (see Mortimer on Probate, 2nd ed., p. 208). There has been no prosecution of the plaintiff in respect of this alleged felony, and so long as that continues, this allegation cannot be maintained in a civil action : *Smith and Wife* v. *Selwyn* (3).

WILLMER J. having stated the facts continued : Objection to para. 1 of the defence was taken by the plaintiff on two grounds. First, it was said that the allegations made therein are irrelevant, in the sense that even if all the facts alleged were proved it would not affect the right of the plaintiff to prosecute this action or to have the will established. Secondly, it was said that the charges made in the paragraph, and in the substance of case thereunder, are not maintainable in a civil action, having regard to the fact that no steps have been taken to prosecute the plaintiff in respect of the felony alleged. I was informed by counsel for the plaintiff, although this does not appear from the terms of the order appealed from, that the learned registrar in fact decided in favour of the plaintiff on the first of these grounds, and it was mainly on this ground that it was sought to support the registrar's order before me.

I am relieved of the necessity of considering whether the allegations put forward in the substance of case would be sufficient to justify a charge of felony by the admission of

(1) (1873) L. R. 8 Ex. 88.
(2) (1885) 17 Q. B. D . 93.
(3) [1914] 3 K. B. 98, 104.

1946

IN THE ESTATE OF G., DECD. M. v. L.

Willmer J.

Mr. Latey, on behalf of the plaintiff, that assuming the allegations were proved there would at least be a case to go to a jury. I do not desire here to say anything which might in any way prejudice the fair trial of the action, but I think I should state that having regard to the decision of the Court of Criminal Appeal in *Rex* v. *Bonnyman* (1), in which a number of previous decisions were exhaustively reviewed, the admission was in my view properly made.

In order to decide whether para. 1 of the defence discloses a relevant defence to the action, it is necessary to assume for the purpose of argument that the allegations made are true, and that the plaintiff did feloniously kill the deceased. Mr. Latey argues that, assuming he did, that would not in any way affect his right to bring the present action or his claim to have the will established. It is conceded that on that view of the facts the plaintiff would not be entitled to take any benefit under the will, but that, it is said, is not relevant to the claim made in the present action. Even a convicted felon, it is urged, may act as executor—see the passage in Mortimer on Probate 2nd ed. at p. 208, and the cases there cited.

In this case, however, the plaintiff does not claim as executor, and I think it is important to state exactly what is the plaintiff's interest under the alleged will. The will, in fact, appoints no executor, but merely purports to give the whole of the property of the deceased to the plaintiff. If the gift to the plaintiff is good, he would clearly be entitled to a grant of administration with the will annexed. But if the gift to the plaintiff fails he would have no such right, and the estate would have to be administered as on an intestacy.

In these circumstances how can it be irrelevant to allege by way of defence that the plaintiff, by reason of his felony, is disentitled from taking any benefit under the will? The principle was clearly stated by Lord Atkin in *Beresford* v. *Royal Insurance Co.* (2), in the following words "A man is not to be "allowed to have recourse to a court of justice to claim a "benefit from his crime whether under a contract or a gift." Earlier in the same case, Lord Atkin expressly approved the dictum of Fry L.J. in *Cleaver* v. *Mutual Reserve Fund Life Association* (3), as follows: "It appears to me that "no system of jurisprudence can with reason include amongst "the rights which it enforces rights directly resulting to the

(1) (1942) 28 Cr. App. R. 131.
(2) [1938] A. C. 586, 596, 598.
(3) [1892] 1 Q. B. 147, 156.

1946

IN THE ESTATE OF G., DECD.
M.
v.
L.

Willmer J.

"person asserting them from the crime of that person." On this principle, in *Crippen's* case (1), a grant of administration of the murdered wife's estate was refused to the personal representative of the husband, the murderer. In the later case of *Hall* v. *Knight and Baxter* (2), a party who claimed as legatee under a will was struck out, on proof that she had been guilty of the manslaughter of the deceased. I do not see how it is possible to escape the conclusion that if the allegations made in para. 1 of the defence are proved not only will the plaintiff be disentitled from taking under the will, but the whole will must fail. The plaintiff could have no interest in asserting its validity, and the action would amount in effect to an abuse of the process of the court. In these circumstances I cannot accede to the argument that para. 1 of the defence is irrelevant.

It remains to consider whether the decision of the learned registrar can be supported on the alternative ground, namely that the allegations made in the paragraph complained of cannot be maintained in a civil action unless and until the plaintiff has been prosecuted in respect of the alleged felony. In spite of the critical comments of Bramwell L.J., in the case of *Ex parte Hall* (3), it has been long held to be a rule, founded on public policy, that a plaintiff who is injured by the felonious act of the defendant is not allowed to maintain a civil action against the defendant in respect of such injury unless and until the defendant has been prosecuted for his felony. But it is argued that this rule has no application to the present case, since the defendants who make the allegations complained of are not the persons injured by the plaintiff's alleged felony. In my judgment Mr. Cloutman's argument is well supported by authority. In the case of *Osborn* v. *Gillett* (4), the action was brought by a master for injuries inflicted on his servant causing the death of the servant. It was pleaded on behalf of the defendant that the act complained of amounted to a felony, and that the person committing it had not been prosecuted. It was held, on demurrer, that the plea was bad. Bramwell B. said "In this case I see no greater duty on the "plaintiff than on anyone else to prosecute." In *Appleby* v. *Franklin* (5), the action was brought by a father for seduction of his daughter, and the statement of claim alleged facts which,

(1) [1911] P. 108.
(2) [1914] P. 1.
(3) (1879) 10 Ch. D. 667.
(4) L. R. 8 Ex. 88, 93.
(5) 17 Q. B. D. 93.

1946

IN THE ESTATE OF G., DECD.
M.
v.
L.

Willmer J.

if proved, amounted to felony. It was held that the paragraph in the statement of claim could not be struck out, inasmuch as the plaintiff was not the person upon whom the felonious act was committed. The judgments of Huddleston B. and Wills J. were expressed to be based on the authority of *Osborn* v. *Gillett* (1). Both these decisions were expressly approved by the Court of Appeal in *Smith and Wife* v. *Selwyn* (2). That was a case in which damages were claimed by a husband and wife in respect of an alleged felonious assault on the wife, and an order was in fact made staying the proceedings unless the statement of claim were amended, but (as appears from the judgment of Kennedy L.J.) this was on the basis that the wife was the party injured by the alleged felony, and the husband's claim was so bound up with hers as to be inseparable from it. In view of the express approval in this case of the decisions in *Osborn* v. *Gillett* (1) and *Appleby* v. *Franklin* (3), I cannot take it as being in any way an authority against the proposition contended for by the defendants in this case.

I should perhaps add two further observations. One is that, whatever may be the principle which forbids a plaintiff to found a claim on the alleged felony of the defendant, there is no principle of which I am aware which prevents a defendant from alleging that the plaintiff's claim is vitiated by the plaintiff's own felony. On the contrary, public policy to my mind demands that where a plaintiff seeks to set up a claim arising out of his own felonious act, the defendant should be allowed to take full advantage in his defence of the rule that no man can be allowed to have recourse to the court to claim a benefit from his own crime. The other observation which I should like to make is that, even if, contrary to the view which I have expressed, there is any rule which would prevent the defendants in this action from resisting the plaintiff's claim on the ground of the plaintiff's alleged felony until the plaintiff has been prosecuted, I am far from satisfied that the plaintiff's proper remedy would be to have the paragraph of the defence struck out. This point, however, does not arise on the view which I take. I hold that there is no rule of law which disentitles the present defendants from alleging in their defence that the plaintiff has been guilty of felony.

For all these reasons my conclusion is that the learned registrar's decision was wrong, and his order striking out para. 1 of

(1) L. R. 8 Ex. 88, 93.
(2) [1914] 3 K. B. 98. 104.
(3) 17 Q. B. D. 93.

1946

IN THE ESTATE OF G., DECD.
M.
v.
L.

Willmer J.

the defence and the substance of case thereunder must be set aside.

I am not blind to the fact that this court is not the ideal place in which to adjudicate upon an allegation of felony, and I recognize that there may well be grave practical difficulties and inconvenience in trying such an issue here. This, however, is not a reason for denying to the defendants the right to rely in their defence upon allegations which, if proved, will in my judgment defeat the plaintiff's claim and entitle the defendants to judgment.

Appeal allowed.

Solicitors for the plaintiff: *Francis Miller & Steele, Agents for Livingston & Pattie, Newcastle-on-Tyne.*

Solicitors for the defendants: *Hewitt, Woollacott & Chown, Agents for Swinburn G. Wilson & Son, Newcastle-on-Tyne.*

I. G. R. M.

THE SALERNO.

1946
May 9, 10; *June* 6.

Lord Merriman, P.

Prize Court—Practice—British merchant ship—Seized in prize by enemy—Condemnation as prize by enemy Prize Court—Abandonment by British owners—Adapted for war purposes by enemy—Retaken by British—Writ for condemnation issued by British captor—Appearance and claim for restoration by original British owners—Prerogative of Crown to effect release—Withdrawal from adjudication—Naval Prize Act, 1864 (27 & 28 *Vict., c.* 25), *ss.* 40 *and* 55.

A British ship captured by the Germans and condemned as prize by a German Prize Court was recaptured by the British, brought into Hull and placed in the custody of the Admiralty Marshal in accordance with the provisions of s. 16 of the Naval Prize Act, 1864. The captor issued a writ asking for the condemnation of the ship. The Ellerman Wilson Line, Ld., who were the registered owners of the ship at the time of her capture by the Germans entered an appearance in the prize action claiming her return under the provisions of s. 40 of the Naval Prize Act, 1864. There was evidence before the court which both the captors and the original British owners agreed might entail the ship's condemnation on the ground that she had been set forth as a ship of war. The question was whether she should be restored to her original owners or condemned as prize for the benefit of the captor, which in the

1946

THE SALERNO.

absence of a grant of prize to the Navy would be for the benefit of the Crown. The Crown exercising its prerogative expressed through its proper officer, the Procurator-General, its desire to withdraw the case from adjudication by the court. In view of the saving of the prerogative contained in s. 55 of the Naval Prize Act, 1864, the case for condemnation was withdrawn and the court thereupon released the ship to the original owners. In the circumstances the court will not inquire into the title of the owners.

APPLICATION FOR A DECREE OF RESTITUTION by the original owners of the *Salerno*, a registered British ship which was seized in prize by the Germans and subsequently recaptured by the British navy. The Procurator-General, on behalf of the Crown, sought to withdraw the vessel from condemnation as prize by the court.

The facts are fully set out in the judgment.

Mocatta for the claimants. I am entitled to release under s. 40 of the Naval Prize Act, 1864 (1), whatever the facts may be because I am not a ship of war. If, contrary to my contention, I did become a ship of war, I became the property of the Crown on recapture and there was no necessity for condemnation. For a ship to become a vessel of war she must be of an offensive character. (See Colombos' Treatise on Law of Prize, 2nd ed., at p. 258.) Condemnation as prize by an enemy court does not operate against the rights of British owners (see *Cornelia* (2)). Counsel referred to *L'Actif* (3), *Horatio* (4), *Georgiana* (5), *Ceylon* (6). The case should be

(1) Naval Prize Act, 1864, s. 40: "Where any ship . . . . belonging to any of Her Majesty's subjects after being taken as prize by the enemy is . . . . retaken from the enemy by any of Her Majesty's ships of war the same shall be restored by decree of a Prize Court to the owner . . . . . Provided also, that where a ship after being so taken is set forth or used by any of Her Majesty's enemies as a ship of war, this provision for restitution shall not apply, and the ship shall be adjudicated on as in other cases of prize."

Section 55: "Nothing in this Act shall—

"(4.) take away, abridge, or control, further or otherwise than as expressly provided by this Act, any right, power, or prerogative of Her Majesty the Queen in right of her Crown, or in right of her office of Admiralty, or any right or power of the Lord High Admiral of the United Kingdom, or of the Commissioners for executing the office of Lord High Admiral;"

(2) (1810) Edw. 244.
(3) (1810) Edw. 185.
(4) (1806) 6 C. Rob. 320.
(5) (1814) 1 Dods. 397.
(6) (1811) 1 Dods. 105.

1946

THE SALERNO.

decided on the evidence called by the parties; the evidence in letters should not be admitted.

J. V. Nesbitt for the Crown. Order 13 of the Prize Court Rules (1), provides that there may be release on consent by the parties concerned. Release must issue if all parties are agreed. The Crown is the captor and the re-insurer; the vessel is, therefore, Crown property and the Crown could, if so disposed, give it away. This vessel became an armed enemy ship after condemnation by the German Prize Court. There was no obligation to put an armed vessel into the British Prize Court.

[THE PRESIDENT. The question will be whether s. 40 of the Naval Prize Act, 1864, overrides the prerogative of the Crown apart from the Prize Salvage Act, 1944.]

The Crown has started proceedings against a vessel the property in which is vested in it and now desires to withdraw. The Crown has power to act extra-judicially where there is a claimant.

Cur. adv. vult.

June 6. LORD MERRIMAN P. read the following judgment. This is an application for the release of the steamship *Salerno*, a ship seized in prize, on payment of the Marshal's expenses and appropriate court fees. The original summons, addressed to the Treasury Solicitor as solicitor for the Procurator-General, was taken out by the West of England Mutual War Risks Association, Ld., the insurers of the vessel. The summons is supported by the Procurator-General and is intended to raise the question what limitations, if any, apply to the right of the

(1) The Prize Court Rules, 1939, Or. 13, r. 1: "Property in the "custody of the court whether "under arrest or otherwise shall "only be released under the "authority of an instrument "issued from the Registry (Appen- "dix A, Form No. 32) to be "called a release."

Rule 2: "A release shall be "issued at any time before ad- "judication upon the application "of the proper officer of the "Crown."

Rule 3: "A release may be "issued at any time upon the order "of the judge."

Rule 4: "A release may (unless "there is a caveat outstanding "against the release of the "property) be issued in the follow- "ing cases upon the order of the "Registrar:—

"(*a*) upon a consent (con- "ditional or otherwise) being filed "by the proper officer of the "Crown.

"(*b*) where proceedings insti- "tuted by or on behalf of the "Crown are discontinued."

1946

THE SALERNO.

Lord Merriman, P.

Crown, through its proper officer, to release ships and goods seized in prize and brought before the Prize Court, without proceeding to adjudication. As will be seen in the course of this judgment, the circumstances raising this question only appeared fully in the course of the proceedings.

On one view of the facts as they are now known, the actual question is whether this right of the Crown subsists in a case in which the claimant cannot, by virtue of an Act of Parliament, have any right or title to the ship.

The facts are as follows: Before the war of 1939 the ship was owned by the Ellerman Wilson Line, Ld., and was registered at Hull. On April 15, 1940, she was captured by the Germans while on a voyage from Bergen to Hull. On April 19, 1940, the owners gave notice of abandonment to the claimant underwriters. On June 12, 1940, the ship was brought before the Hamburg Prize Court by which, on October 4, 1940, she was condemned as prize. By various instalments, the details of which are immaterial, the owners were paid as for a total loss. In fact, the Crown reinsured ninety-six per cent. of the loss. On June 2, 1945, the ship arrived in Hull from Eckernforde where she had been captured in the course of the invasion of Germany, and on July 6, 1945, she was seized in prize. The writ was issued on August 21, 1945, and on August 26, she was released on requisition to the Ministry of War Transport. On January 10, 1946, the claimant underwriters, by consent of the Treasury Solicitor, entered an appearance out of time, and took out this summons on February 1, 1946. After the summons had come before the registrar, and had been referred by him to the court, the original owners, on April 9, 1946, also entered an appearance as claimants, to avoid any question whether the Prize Court would recognize a claim by insurers.

The claim of the owners is based on s. 40 of the Naval Prize Act, 1864, whereby any ship, belonging to any of His Majesty's subjects, after being taken as prize by the enemy, which is retaken from the enemy by any of His Majesty's ships of war, shall be restored by a decree of a Prize Court to the owner, on his paying as prize salvage certain proportions of the value provided for by the section. The right of the owner to restitution is not, in the circumstances of this case, affected by the mere fact of condemnation by the German Prize Court (see the *Cornelia* (1)). The section, however, contains the following proviso: " Provided also that where a ship, after being so taken

(1) Edw. 244.

1946

THE SALERNO.

Lord Merriman, P.

" is set forth or used by any of His Majesty's enemies as a ship " of war, this provision for restitution shall not apply, and the " ship shall be adjudicated on as in other cases of prize."

[His Lordship reviewed the evidence that established that the *Salerno* had been set forth or used by the enemy as a ship of war, and continued:] Both parties have expressed their willingness to accept the facts thus ascertained, while at the same time uniting in the submission that the facts are irrelevant, and that the court is bound to ignore them, however they were ascertained. At the same time I wish to record my dissent from an argument that the court was not even entitled to consider the report of the customs officer at Hull, written to the Admiralty Marshal as his deputy, because it must be remembered that the ship in question was, at the date of the custom officer's report, in the custody of the Admiralty Marshal, and that the res is notionally in court. The court can examine it with its own eyes, or can rely on a description given by its own officer. It has constantly been the practice for this court to rely on such descriptions of goods seized in prize, supplemented, if necessary, by evidence on affidavit.

Mr. Mocatta called my attention to several cases, none of which is precisely in point. I am inclined to think that the most helpful of these is the *Ceylon* (1). That was the case of an English East India ship which was captured by a French frigate, and at the time of her recapture, was fitted out as a prison ship for the purpose of receiving English prisoners of war. There was evidence, however, that after her capture she had been refitted and supplied with two additional carronades and a French crew, and in that condition she had fought two defensive actions before being taken to Port Napoleon, where she was dismantled. Sir William Scott, as he then was, appears to have relied equally on her use in action and on her later employment as a prison ship, in holding that she had been set forth as a ship of war by the enemy. But I should not be prepared to come to a definite decision on this point without more exact information from the Admiralty. I am prepared to assume, for the purpose of the argument in the present case, that the *Salerno* was set forth or used as a ship of war. If she was not, the proviso to s. 40 does not apply. The claimant owners were undoubtedly her owners at the time of her capture by the Germans and her subsequent condemnation. By the

(1) 1 Dods. 105.

1946

THE SALERNO.

Lord Merriman, P.

Prize Salvage Act, 1944, s. 1, sub-ss. 1 and 3, no proceedings to enforce a claim for services rendered in retaking a ship taken by an enemy shall be instituted after the commencement of the Act, without the consent of the Admiralty or the Secretary of State, and in any proceedings instituted after the commencement of the Act otherwise than to enforce such a claim as aforesaid, no such claim shall be made, or shall be relied upon by way of defence or otherwise, without the like consent. I am authoritatively informed that no such consent has been given. From this it follows that the owners would be entitled, by virtue of the operative part of s. 40 of the Naval Prize Act, to restoration free from any claim for prize salvage, and that if the matter came to adjudication, the court would decree the restoration of the ship to them. On the other hand, if she was set forth or used as a ship of war, the provision for restoration does not apply, and "the ship shall be adjudicated on as in other cases "of prize." On this hypothesis, if the matter proceeded to adjudication, she would be condemned to the Crown.

The question at issue is: whether, notwithstanding the proviso to s. 40 that, in the one case, the ship "shall be restored "by decree of a Prize Court to the owner," and on the other hand, that the ship "shall be adjudicated on as in other cases of "prize," the Crown can release the ship without proceeding to adjudication and, on the assumption that I am making for the purpose of the argument, although the persons to whom the ship is being released could have no claim to her.

By the combined effect of the Prize Court Act, 1894, and the Prize Court (Procedure) Act, 1914, the Prize Rules now in force are substituted for the sections of the Naval Prize Act, 1864, dealing with procedure, but in lieu of the repealed s. 22, the words "Nothing in this section shall apply to ships of war taken "as Prize" are inserted in s. 16 of the Act. This preserves the position that, whereas all ships other than ships of war seized in prize must be delivered up to the marshal and brought before the court, the captors have the option whether or not to do so in the case of the seizure of ships of war. But whether this ship is a ship of war or not, she has in fact been brought into the Prize Court, and, subject to any right which the Crown may have to reclaim possession of a captured warship as its own property without proceeding to condemnation, as to which it is unnecessary to express any opinion, the Prize Court Rules apply in either case.

Now the provisions relating to releases are contained

in Or. 13. By r. 1 property in the custody of the court, whether under arrest or otherwise, shall only be released under the authority of an instrument issued in the registry, to be called a release. The form of the instrument is given in appendix A., form 32, and is the marshal's authority to allow the ship to be taken from his custody. By r. 2, a release shall be issued at any time before adjudication upon the application of the proper officer of the Crown, who, by Or. 1, r. 1, in this case is H.M. Procurator-General. By r. 3 a release may be issued at any time upon the order of the judge. Rule 4 deals with cases in which a release may be issued upon the order of the registrar. The submission by all parties is that r. 2 is intended to give effect to the right of the Crown, established by the *Elsebe* (1). and other authorities, to effect releases of ships or goods seized in prize ; that it is peremptory, and that it precludes any consideration of the merits by the court.

It is worth while recalling how this question has developed during the recent war. The case above cited and Or. 13, r. 2, were invoked in chambers in the *Gloire de Paimpol*, as obliging the court to order a release although no writ had been issued. I came to the conclusion that Or. 13 did not apply until a prize cause was constituted by the issue of a writ. In the *Excambion*, also heard in chambers, the same argument was used to oblige the court to release a cargo to a Ministry of the Crown, although there was no claimant on the record and the Procurator-General, in the first instance, declined to give any indication that the Ministry in question had any right or title to the goods. I came to the conclusion that such a transaction could not properly be called a release at all.

There appears to me to be a very wide distinction between extra-judicial release of the kind dealt with in the *Elsebe* (1) and the claim to a right on the part of the Crown to bestow at pleasure a ship or goods seized in prize without proceeding to condemnation. It seemed to me that release, as appears from the form above referred to, implies the existence of a claimant asserting some title to the goods, and that what appeared to be a mere handing over by the Crown, as captor, to one of its own departments, could not fairly be described as a release, but seemed rather to savour of a requisition without complying with the conditions laid down in the *Zamora* (2). But I was prepared to adjourn the matter into open court for further argument. In fact, the Ministry in question entered a

(1) (1804) 5 C. Rob. 173. (2) [1916] 2 A. C. 77.

1946

THE SALERNO.

Lord Merriman, P.

claim; whereupon it appeared that it had acquired a title as purchaser of the goods from the original owner, and the goods were released accordingly. I wish to make it clear, however, that what was being contended for in those cases was an absolute right of the Procurator-General to release to anyone he chose without giving the court any information and although, in the one case, no cause had been constituted, and in the other, there was no one on the record to whom a release could be made. But I can well imagine cases where, for example, a mistake has been made in the seizure, in which it might be desirable to correct the error as soon as possible, even before the true owner has entered an appearance. In such a case the mistake could be put right judicially, for the judge could give leave to discontinue under Or. 6 of the Prize Court Rules, and under Or. 13, r. 3, could order a release to any person as to whose right he was satisfied. Indeed, the release could be ordered by the registrar where the proceedings had been instituted by or on behalf of the Crown (ibid. r. 4 (*b*)).

In this case the question, as I see it, is whether the express wording of s. 40 of the Naval Prize Act, 1864, involving that if this ship is a ship of war she shall be "adjudicated upon," or if not she shall be restored by "decree of the Prize Court" to the owner, curtails the right of the Crown to effect release to the claimant owners. It was argued that even assuming she had been set forth as a ship of war the court would be "adjudicating" on her by ordering a release to the claimants. I feel some reluctance to hold that a court can be compelled, by a mere rule of procedure, to adjudicate contrary to the known facts. In my opinion, however, the *Elsebe* (1) decided beyond question that a release by the Crown to the owner is entirely extra-judicial and involves no question of adjudication. Indeed, in that case the release was actually made at the instance of the Secretary of State after a decree of condemnation and while an appeal by the claimant to the Privy Council was pending. Sir William Scott, in his judgment, in that case, after showing, as he does on pp. 184 and 185, that although captors have a duty to bring prizes to adjudication, this duty imports no right to proceed to adjudication and, on p. 187, that the Crown has the right of controlling the whole proceedings until final adjudication, and that the practice had been unquestioned for the Crown to direct the release of ships before final adjudication, he says on p. 188 that all that appeared in

(1) 5 C. Rob. 173.

the books of the court was that the proctor, then proceeding for the Crown as he must do, declares that he proceeds no further. The court then issues an order of restitution as a matter of course and of necessity. On p. 191, he deals with the argument that the captors, besides losing their prize, might sustain the hardship of being held liable for costs and damages. He disposes of this by the consideration, first, that after acceptance of such an extra-judicial release the claimant would no longer be competent to proceed against the captor; the act of acceptance would be considered as a waiver of his judicial remedy, as a total release on the one side and on the other; and if the captor was to appear under protest, alleging that the claimant had accepted such an extra-judicial release, he could not but think that the court would pronounce the protest to be wellfounded and dismiss him from any further responsibility. Or secondly, if the court did not overrule the protest, it would surely not deny the captor his right to proceed, not indeed for the adjudication of any prize interest under the seizure, but for all purposes of justification. I lay stress upon the twice repeated use of the words "extra-judicial release"; and the supposition that there is a claimant to whom the release is made. Lord Brougham followed and applied the *Elsebe* (1) in *Alexander* v. *Duke of Wellington* (2).

How then is this indisputable right of the Crown to release to a claimant before adjudication affected by the express words of s. 40 of the Naval Prize Act, 1864? Can this same prerogative right be relied on where a British statute has enacted that in certain circumstances a British ship is to be withheld from her former British owners? In my opinion, it is important to consider the effect of s. 55 of the Naval Prize Act, 1864. By this section it is provided that: "Nothing in this Act shall (4.) take "away, abridge or control, further or otherwise than as "expressly provided by this Act, any right, power or prerogative of Her Majesty the Queen in right of her Crown, or in "right of her office of Admiralty . . . ."

In face of this section it would, in my opinion, be straining the construction of s. 40 to hold that the right of the Crown to forgo condemnation differs according as the right to condemnation depends on the general law of prize, as in the *Elsebe* (1) or on the statute. In either case the right to condemnation may be equally indisputable if the cause proceeds to adjudication. The prerogative right to effect extra-judicial release

(1) 5 C. Rob. 173. (2) (1831) 1 Russ. & M. 55.

1946

THE SALERNO.

Lord Merriman, P.

to a claimant owner being established as part of the law of prize in the one case, cannot, in my opinion, be destroyed by a statute which, on proof of certain facts, entitles the Crown to condemnation under one section, while, by another section, providing that nothing shall take away, abridge or control the prerogative further or otherwise than as expressly provided by the Act. Accordingly, I direct that the ship be released to the claimants, the Ellerman Wilson Line. I do so by reason of the right, power or prerogative of the Crown to release to the former owners, and in spite of the fact that, if the matter proceeded to adjudication, it might well be held that by the proviso to s. 40 of the Act any right they had was extinguished.

Solicitors for the claimants: *Holman, Fenwick & Willan.*
Solicitor for the Crown: *Treasury Solicitor.*

H. G.

1946
July 1.

Willmer J.

J. & W. NICHOLSON & COMPANY LIMITED *v.* OWNERS OF BARGE "HUMORIST" AND OTHERS.

THE "HUMORIST."

Shipping—Damage at berth—Warehouse-owner—Limitation of liability—Landing-place — Dock — Meaning — Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 & 64 *Vict. c.* 32), *s.* 2, *sub-ss.* 4, 5.

A warehouse built on the bed of a river or creek and constructed with an aperture in its walls for the delivery of goods into or from craft lying alongside is a "landing place" which is included in the definition of a "dock" for the purposes of s. 2, sub-s. 4, of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900. The owners thereof are persons having the control or management of the "dock" and are entitled to limit their liability in respect of damage and loss caused to craft and goods on board by their negligent management of the berth adjacent to the warehouse where craft had to lie to deliver or receive goods.

The plaintiffs, J. & W. Nicholson & Co., Ld., as owners and occupiers of a wharf known as Nicholsons' Wharf at Bromley-by-Bow, sought to limit their liability in respect of damage and loss caused to the dumb barge *Humorist* and the cargo laden on board of her. On March 27, 1943, the *Humorist* berthed at the said wharf and lay moored there until March 29

when she was loaded with grain. During the following night while still lying at the berth she sank and suffered damage and her cargo was destroyed or damaged. In an action by the present defendants against the present plaintiffs Pilcher J. on January 13, 1944, gave judgment against the present plaintiffs on the ground that they failed to exercise reasonable care in the control or management of the berth.

The present defendants denied (inter alia) that the said loss and damage was caused without the actual fault or privity of the present plaintiffs, and that the berth in question constituted a dock within the meaning of s. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (1).

Further material facts are fully set out in the judgment.

R. Gething, for the defendants: The plaintiffs are not entitled to limit their liability. The berth on which the *Humorist* settled is not of such a character as to come within the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, s. 2, sub-s. 4. That statute must be construed restrictively. The berth in question is not the property of the plaintiffs. The place in question did not correspond to the definition of a " dock " given in the leading dictionaries. See also the definition of the word in Wharton's Law Lexicon, 14th ed. at page 341. Nor could it be properly described as a " wharf " because the front of the warehouse goes uninterruptedly down to the river bed, and there is no quay space in front for the handling of merchandise. Even assuming that the warehouse comes within the definition of a " landing place," the berth in front of it is not. The place where the damage was done is that which must be regarded and, in the present case is not within the area included in the definition, and, therefore, not entitled to the protection of the Act.

D. A. Scott Cairns, for the plaintiffs: This place is either a " landing place," a " wharf," or a " tidal basin." With regard to whether it is a wharf, see the Merchant Shipping

(1) The Merchant Shipping (Liability of Shipowners and Others) Act, 1900, s. 2, sub-s. 4: " For the purpose of this section " the term ' dock ' shall include " wet docks and basins, tidal " docks and basins, locks, cuts, " entrances, dry docks, graving " docks, gridirons, slips, quays, " wharves, piers, stages, landing " places and jetties."

Sub-section 5: " For the purposes of this section the term " ' owners of a dock or canal ' shall " include any person or authority " having the control or management of any dock or canal as " the case may be."

1946

J. & W. NICHOLSON & CO., LD. v. OWNERS OF BARGE "HUMORIST" — THE "HUMORIST"

Act, 1894, s. 492. To bring the place within the definition of a " landing place," the test is whether the place is adapted to the use of landing goods, and was, in fact, used for that purpose. The place in question was so adapted and was so used. The expression " landing place " is perfectly general and is not confined to a " landing stage."

Again, the test is the place where the damage complained of occurred; not the capacity in which the dock-owners were acting, nor the causation of the damage: the *Ruapehu* (No. 2) (1). The premises here and the berth adjacent to them came within one or other of the definitions, and the plaintiffs are entitled to a decree.

WILLMER J., having stated the facts and decided other matters in issue, proceeded: The remaining point for my decision is whether the plaintiffs are persons who come within the statute at all in the sense that they are dock-owners. Their premises have been described in evidence before me, and I do not think that they could be better described than by reference to the large-scale photograph which has been put in evidence. This shows that the place where the barge in question was moored was along the front of a warehouse, consisting of a perpendicular wall going right down to the bed of the river. In the middle of the front wall there is a door which is just above water level, so placed for the purpose of landing goods from craft, and, I suppose, equally for the reverse process of loading goods on to craft. The berth occupied by the barge was constructed on the bed of the river or creek immediately in front of the warehouse, so that a barge using it would lie in front of the door in the warehouse wall when delivering or receiving goods.

The words I have to construe are those contained in s. 2, sub-s. 4, of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, which purport to define the meaning of " dock "

It is said by Mr. Gething, on behalf of the defendants—and, I think so much is assented to on behalf of the plaintiffs—that nothing in the plaintiffs' premises can be described as a " dock " properly so-called. My attention has been drawn to the fact that the definition clause in defining " dock " does so by use of the word " includes " rather than by use of the word " means " That is to say, it does for convenience

(1) [1929] P. 305.

include in the meaning of the word " dock " for the purposes of this statute a number of loci which no ordinary person would describe as " docks." Mr. Gething contends that the court has first to consider whether the plaintiffs' premises are a " dock " in the proper sense of that term and, if not, whether they come within any of the other expressions which are used in the sub-section and brought within the meaning of the word " dock " for the purposes of the sub-section. Reference has been made to various dictionaries to show that the proper meaning of the word " dock " implies an enclosed space, with gates to allow the admission and retention of water. On that basis I think that it is quite clear that the plaintiffs cannot claim to be the owners of a " dock " within the narrow and strict sense. But they contend that they are, at least, the owners of premises which can fairly be described as either a " wharf," a " landing place " or a " tidal basin." I am satisfied that nothing in the plaintiffs' premises corresponds in the least to my idea of what a tidal basin is, and I think that that contention is out of the question.

With regard to the word " wharf," I am doubtful whether any part of the plaintiffs' premises could properly be described as a " wharf." Although expressing a doubt as to that, it is not necessary for me to arrive at a final decision on that point, because, having heard the very careful arguments delivered to me on both sides, I am now satisfied that the plaintiffs are the owners of a " landing place." The words " landing place " are nowhere defined in the section of the Act, and I think, in those circumstances, their meaning has to be arrived at on common-sense principles. Therefore, I ask myself whether the front of a warehouse, which is so built as to have an aperture through it for the admission of goods from craft, and which has alongside it a prepared berth in which craft can lie for the purpose of landing and loading goods, can properly be described as a " landing place." It seems to me that if that is not a " landing place " it is very difficult to see what a " landing place " could be. The place in question is a place adjacent to the plaintiffs' warehouse, where craft are, in fact, invited to come and lie for the purpose of landing their goods. I therefore hold that this is a " landing place."

Mr. Gething, however, submits another contention for my decision, namely, that I have to be satisfied not only that the plaintiffs are owners of a " landing place," and, as such are dock-owners within the meaning of the Act, but that the

1946

J. & W. NICHOLSON & CO., LD. v. OWNERS OF BARGE "HUMORIST"

THE "HUMORIST"

Willmer J.

damage sustained by the owners of the barge *Humorist*, the first defendants, was sustained within the area over which the plaintiffs exercised control. The plaintiffs undoubtedly exercised control over their own warehouse, but counsel contends that the river bed in front of the warehouse where the berth has been made is nothing more nor less than a river bed, with regard to which the plaintiffs' duties are merely those of invitors in respect of the craft which they invite to come thereto. He also contends that this is a case in which the damage to the barge was caused simply through her lying on the berth, and was not damage which the plaintiffs caused in their capacity as dock-owners. There are, in my opinion, two answers to that contention, one as a matter of authority and the other as a matter of principle. As a matter of authority it seems to me that the decision of the House of Lords in the *Ruapehu* (1) is contrary to counsel's contention. That was a case where a ship was damaged while in a dock belonging to ship-repairers, and was damaged by the negligence of the dock-owners not in their capacity as dock-owners, but in their capacity as ship-repairers. The House of Lords said that that circumstance was not a relevant consideration, provided the ship was in the area over which the plaintiffs, as dock-owners, exercised control. I think that that decision goes a long way towards answering the point made by counsel for the defendants, namely, that in this case it was not the warehouse which caused the damage, nor the plaintiffs as warehouse-owners who caused the damage, but the berth, and that there is nothing in the Act about "berths." Apart from authority, however, it should be remembered that when the action from which the present matter arises was before Pilcher J. when the present plaintiffs were the defendants, the present defendants succeeded on the basis that the berth in question was a part of the area over which the present plaintiffs exercised control. That is to say, the present defendants' case, which succeeded, was that it was part of the present plaintiffs' duty to exercise control over the berth—and the action succeeded on the basis that the then defendants had failed in that duty. I do not think that it matters for this purpose in whom the ownership of the berth was vested. In their capacity as owners of the adjoining premises the plaintiffs invite craft to come and use the berth, and they therefore come under a duty to exercise a certain measure of control

(1) [1927] A. C. 523.

over the berth, sufficient, in my judgment, to make it obvious that a craft which is using the landing place at their premises by sitting on the berth, is within the area over which the present plaintiffs exercise control.

In those circumstances, it seems to me that the plaintiffs have brought themselves within the statute; that they are the owners of a "dock" within the meaning of the Act, and that the damage complained of in this case was damage caused without their actual fault or privity within the area over which they exercise control. In the circumstances, and in my judgment, the plaintiffs are entitled to a decree of limitation of liability.

Judgment for the plaintiffs.

Solicitors for the plaintiffs: *J. A. & H. E. Farnfield.*

Solicitors for the defendants: *Stocken, May, Sykes & Dearman.*

H. G.

ALSTON *v.* ALSTON.

1946

May 27.

Willmer J.

Divorce — Desertion — Petition — Material date for presentation of petition—Whether date on which signed by petitioner or date filed with court—Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2.

The date on which a petition is "presented" within the meaning of s. 2 of the Matrimonial Causes Act, 1937, is the date on which it is filed. Proof, therefore, of desertion for three years immediately preceding the filing of the petition entitles the petitioner to a decree, even though the three years had not elapsed at the date on which the petition was signed.

HUSBAND'S PETITION FOR DIVORCE on the ground of desertion.

The petitioner signed the petition, and the affidavit verifying it, on October 10, 1945, but the petition was not filed with the court until October 31, 1945. The petitioner's case was based on desertion by his wife as from October 17, 1942.

V. G. Hines for the petitioner. The question to be decided is whether for the purpose of s. 2 of the Matrimonial Causes

1946

ALSTON v. ALSTON.

Act, 1937(1), the date of presentation of the petition is the date on which it is signed by the petitioner or the day on which it is filed with the court. There is no authority which lays down what is the meaning of "presentation of the petition" in that section, but r. 3 of the Matrimonial Causes Rules, 1944, provides that every matrimonial cause must be commenced by filing a petition to the court. It is submitted therefore that the date the petition is presented must be the date on which it is filed with the court, in which case the petitioner has proved three years' desertion immediately preceding the presentation of the petition, and he is entitled to a decree. The point is a purely technical one, but if the correct date were the date on which the petition was signed by the petitioner, these proceedings would have to be commenced all over again.

WILLMER J. I think it right that I should say in a few words what I think of this case, because I believe it to raise a novel point. According to s. 2 of the Matrimonial Causes Act, 1937, the petitioner, if he is to succeed, must establish a period of desertion of at least three years immediately preceding the presentation of the petition. It therefore becomes obvious that it is vital to decide at what stage a petition is presented. If the words the "presentation of the "petition" refer to the date when the petitioner signs it and swears his affidavit, in this case the three years had not elapsed. If, on the other hand, the words refer to the date when it is filed with the court, then the three years have elapsed, and the case having otherwise been completely proved, the petitioner is entitled to his decree.

There appears strangely enough to be no authority which counsel has been able to find as to what presentation of the petition means. I have been referred to r. 3 of the Matrimonial Causes Rules, 1944, which does specify that every matrimonial cause shall be commenced by filing a petition addressed to the High Court. It has been argued with some considerable force that a petition can only be said to be presented when it actually reaches the court. That must be, and can only be, on

(1) Matrimonial Causes Act, 1937, s. 2: "176. A petition for "divorce may be presented to the "High Court . . . . on the ground "that the respondent . . . . (*b*) has "deserted the petitioner without "cause for a period of at least "three years immediately pre- "ceding the presentation of the "petition."

1946

ALSTON v. ALSTON.

Willmer J.

the day when the petition is filed. The point is purely a technical one. If I decided that this petition was presented on October 10, it would have the effect of causing this petition to be dismissed, and would involve instituting new proceedings on what could only be a technical point. I think both on the merits of the case and also on the technical ground, I must decide that a petition is presented when it is filed with the court that is to say, in this case on October 31, 1945. That being so, on the date when this petition was presented, in accordance with the meaning which I attach to the word, the three years had already run, and I therefore hold that the petitioner is entitled to succeed. There will therefore be a decree nisi.

Decree nisi granted.

Solicitors for the petitioner: *Church, Rendell & Co.*

I. G. R. M.

JOHNSON *v.* JOHNSON.

C. A.

1946

Feb. 25, 26.

Lord Merriman P., Willmer J.

Husband and wife—Income tax—Summary jurisdiction—Maintenance order—Wilful neglect to maintain—Separation agreement—Tax not deducted on payments under agreement—Payments stopped by husband to recover tax not deducted—Whether husband entitled to retain tax in respect of past payments of the current financial year.

A husband having failed to deduct income tax in pursuance of r. 19 of the All Schedule Rules to the Income Tax Act, 1918, on weekly payments to his wife under a separation agreement from April up to the end of July, 1945, claimed to be entitled to recoup himself the tax he had so failed to deduct by withholding future payments until he had repaid himself this tax. The wife took out a summons on the ground of wilful neglect to maintain, on which the justices made an order for maintenance :—

Held, on appeal, that the husband was not entitled to deduct income tax in respect of those past payments which were already completed.

Taylor v. *Taylor* [1938] 1 K. B. 320, discussed and applied.

Per Willmer J., that this was not an action on the agreement, and even if the husband's contention were a good defence to an action on the agreement his liability to maintain his wife continued.

APPEAL from a metropolitan magistrate at North London. On November 2, 1945, the magistrate made an order on

C. A.
1946
JOHNSON
v.
JOHNSON.

a wife's summons for 40s. a week on the ground of the wilful neglect to maintain. By a separation agreement of February 4, 1935, the husband and wife agreed to live separate and apart, and the husband agreed to pay the wife 30s. a week. Nothing was mentioned in the agreement as to income tax deductions. This sum was paid regularly by the husband until 1940 when the wife consented to the amount being varied to 25s. for the time being, on the ground that his financial position had deteriorated, and he agreed to increase the amount when his financial position improved.

Although not entitled to do so, the husband had continued to claim a married man's allowance after the agreement of 1935, until he was stopped by the Inland Revenue about July of 1945. He thereupon consulted an accountant, who pointed out that he was entitled to deduct income tax on the payments under the separation agreement, under r. 19 of the All Schedules Rules to the Income Tax Act, 1918, which he had wholly failed to do (1). Payment was made of the usual instalment on July 28, but thereafter the husband made no further payments, on the ground that he was entitled to withhold all payments until he had recouped the tax he had failed to deduct from the beginning of that financial year. The accountant wrote to the wife on August 2, 1945, explaining this fact, and stated that "we have advised our client that "he must withhold any further payments to you in the present "year until the sum paid to date represents the net figure of

(1) Rule 19 of the All Schedules Rules to the Income Tax Act, 1918, provides: "(1.) Where any ". . . . annual payment (whether "payable . . . . as a personal "debt or obligation by virtue of "any contract or whether payable "half-yearly or at any shorter or "more distant periods), is payable "wholly out of profits or gains "brought into charge to tax, no "assessment shall be made upon "the person entitled to such . . . . "annual payment but the whole "of those profits or gains shall "be assessed and charged with tax "on the person liable to the . . . . "annual payment, without dis-"tinguishing the same, and the "person liable to make such pay-"ment . . . . shall be entitled, "on making such payment, to "deduct and retain thereout a sum "representing the amount of the "tax thereon at the rate or rates "of tax in force during the period "which the said payment was "accruing due.

"The person to whom such "payment is made shall allow "such deduction upon receipt of "the residue of the same, and the "person making such deduction "shall be acquitted and discharged "of so much money as is repre-"sented by the deduction, as if "that sum had been actually "paid."

" 12*s.* 6*d.* a week, that is to say, no further payments can be " made to you for four months, after which the weekly sum " will be 12*s.* 6*d.*"

Assuming an award was possible the wife agreed to accept 30*s.* a week and the husband was willing to settle on that basis.

Bernard Gillis and *Lloyd Davies* for the appellant. There are two questions on this appeal; the first whether the husband was entitled to deduct tax in respect of the earlier payments of that year on which he had failed to make any deductions, and secondly, whether the magistrate was right in finding him guilty of wilful neglect to maintain his wife for making these deductions. According to r. 19 of the All Schedules Rules to the Income Tax Act, 1918, the husband is entitled to deduct income tax in respect of the payments under the separation agreement. The annual payment is not complete until the expiry of the current fiscal year, and the husband is entitled to deduct tax for the whole of that period so long as the payments therefor have not been completed (*Taylor* v. *Taylor* (1)). Slesser L.J. said in *Taylor* v. *Taylor* (1) that " Whenever . . . . the payment for the whole year in " question has not been made, it is still open to the person " liable to make the payment to deduct and retain thereout the " income tax thereon, notwithstanding that for some weeks " during that year the payments were made in full." That proposition exactly covers this case, and the husband is entitled to refrain from making any payments to his wife until he has reimbursed himself the tax which he has failed to deduct during the earlier part of the year. He is entitled to make income tax deductions although the payments were made weekly (*Clack* v. *Clack* (2)). On the second question there can be no wilful neglect to maintain unless the husband has been guilty of something amounting to actual misconduct (*Jones* v. *Jones* (3)). The husband has only done what he was legally entitled to do. It is not suggested that the wife was specifically debarred from bringing maintenance proceedings by the existence of the separation agreement, but her rights were limited by the terms of the agreement (*Diggins* v. *Diggins* (4)). Apart from these payments which the husband had a right to deduct, there is no evidence of any wilful neglect

(1) [1938] 1 K. B. 320, 336.
(2) [1935] 2 K. B. 109, 110, 111.
(3) (1929) 46 T. L. R. 33.
(4) [1927] P. 88.

C. A.
1946
JOHNSON v. JOHNSON.

to maintain upon which the justices could make an order (*Weatherly* v. *Weatherly* (1)).

King Anningson for the respondent. *Taylor* v. *Taylor* (2) has nothing to do with this case; that was a claim under a separation agreement, and it is not relevant on a question of wilful neglect to maintain. *Taylor* v. *Taylor* (2) would only be relevant if the wife were suing under the separation agreement. But, if relevant, that case lays down that deductions can only be made in respect of uncompleted payments, and that once a payment has been completed, no deduction can be made in respect of it, which is the exact opposite of the proposition contended for by the husband. Accordingly, nothing is deductible in respect of the payments in the first part of the year, that is up to August, which were already complete. The husband was guilty of wilful neglect because he deliberately failed to pay what he had contracted to pay under the separation agreement, and the magistrate was right in ordering maintenance. Wilful neglect means that the husband has failed in his duty to provide maintenance for his wife without any reasonable justification. The onus is on him to show that there is some reason why he should be excused that duty: *Papadopoulos* v. *Papadopoulos* (3); *Markovitch* v. *Markovitch* (4). The husband's act in suddenly stopping payments without giving the wife any opportunity to rearrange her affairs cannot reasonably be justified, and this appeal should be dismissed.

THE PRESIDENT, after stating the facts continued: The husband's contention is this: that so long as one penny of the annual payment (that is, of the 25*s.* multiplied by fifty-two weeks) remains unpaid, he is entitled to deduct from any subsequent payment, not merely the tax on the outstanding payments, but also on the payments which have already been made in full; that is to say, as the accountant's letter shows, having overpaid by 12*s.* 6*d.* a week during the first four of the twelve months, he was entitled to stop all payments for the next four months and then to resume them for the last four months of the financial year on the basis of 12*s.* 6*d.* a week.

Now, speaking for myself, if there were no other answer to

(1) (1929) 94 J. P. 38.
(2) [1938] 1 K. B. 320.
(3) [1930] P. 55, 68, 69.
(4) (1934) 50 T. L. R. 416.

the husband's argument, I should hesitate long before I should be prepared to hold that, in the circumstances of this case, having regard to the fact that the whole thing was the husband's mistake, it was a reasonable thing to leave the wife without any maintenance at all for four months, and then to resume on the basis that he was entitled to deduct and retain tax. I should have thought, on any view of the matter, that the magistrate would at least be entitled to hold that assuming him to be entitled to deduct and retain out of future payments the tax which had been deductible but had not been deducted on payments made in full, the reasonable thing would have been to spread that as evenly as possible over the remaining two-thirds of the year, if, indeed, not to spread it further than that.

There is another thing which I should like to say, too, before I deal with what is really the husband's only argument in this case: that the magistrate quite evidently thought that the time had come when the wife's conditional release of 5*s.* a week was no longer operative; and that means this, that confronted with a situation which at the very lowest must be one of great inconvenience, and might be of very great hardship to the wife, the husband himself could have volunteered to restore at least the 5*s.* which she had consented to forgo upon his promise that when his affairs bettered themselves he would pay her more money; and I say this, whether that promise meant that he would restore the former sum of 30*s.* or revise the 30*s.* itself (and I do not in the least mind which it is, for it does not affect my point one way or the other), because the husband admitted in the witness-box that his taxable income for the preceding year had amounted to 350*l.* That means, quite clearly, that he was in a very much better position than he had been when the money was reduced in 1940; so, on any view of the matter, I should be inclined to the opinion that, assuming the husband's rights to be as high as they have been put, nevertheless, the magistrate was justified in saying that he was entitled to go not only behind the terms of the separation agreement (for that, in a proper case, is clearly permissible), but to go behind the income tax law which applies to the operation of a separation agreement. There can be no distinction, as a matter of law, between the right to go behind the terms of the bargain itself and the right to go behind the way in which, according to law including tax law, that bargain is to be implemented.

C. A.
1946
JOHNSON v. JOHNSON.
Lord Merriman P.

That brings me to the argument in law upon which this appeal is based, and I must say I think it is an interesting point, and not wholly free from difficulty, though I am bound to say I have formed a very decided view about it now, after having heard the arguments. The submission that the husband was entitled as between August and December to pay nothing to the wife because he had paid twice as much as he need have paid between April and August, is based solely upon the decision of the Court of Appeal in *Taylor* v. *Taylor* (1). That was a case, like the present, of payments made under a deed of separation, and of the right to deduct and retain tax. It differs from this case in that it was a clear-cut question on the amount of payments which the wife could recover by action on the deed itself. The elements to which I have already referred, which might give the magistrate jurisdiction to deal with the summons for wilful neglect to maintain, even if the husband's actions were strictly governed by his legal rights, did not arise; but I must say that I differ from the submission made by Mr. King Anningson that for that reason this case is wholly irrelevant. It seems to me, for the reason I have given just a moment ago, that if the existence of a deed of separation regulating the amount of maintenance to be paid to a wife by a husband is, to put it at its lowest, a relevant factor in considering the question of wilful neglect to maintain, the husband's legal rights in connexion with the performance of the deed of separation must equally be relevant—relevant, but not, I agree, conclusive.

The case of *Taylor* v. *Taylor* (1) was, so far as the facts are concerned, a great deal more complicated than this present case. It is sufficient to say, however, that the amount payable by the husband was a variable amount depending on the amount of his earnings in any given month, and it fluctuated from 2*l.* to 3*l.* a week according to his circumstances. It is also complicated by the fact that in the early part of the period after the execution of the deed the husband had admittedly underpaid, on any view of the matter, and in the latter period, up to August, 1932, had overpaid, but it appears to have been treated as sufficiently accurate to say that by August, 1932, the total payments made up to that date were equivalent to the amount that he was obliged to pay. In other words, it was plainly treated, for the purposes of that case, that up to August, 1932, payments had been made in

(1) [1938] 1 K. B. 320.

full. As from then to the date of the issue of the writ the husband made payments from which, it is equally clear, he had deliberately deducted sums which had been deductible from earlier payments but which had not been deducted at any time up to the point at which I have indicated the amount was held to be square, namely, August, 1932. That is a somewhat elaborate way of arriving at the identical considerations in this case. In this case, week by week, without any fluctuation, but equally without deduction of tax, the husband had made his proper payment, and, therefore, on the 28th July, 1945, the parties were in the same case in this dispute as were the parties in August, 1932 in *Taylor* v. *Taylor* (1). The account was squared up to date ; all payments in accordance with the deed of separation had been made.

What the Court of Appeal decided when the wife came to bring her action in May, 1935, was that she was entitled to recover everything that had been paid short, by way of deduction for tax, up to the end of the financial year ended on the 5th April, 1932, but that for the financial years or parts of financial years between then and the issue of the writ, namely, the last eight months of the financial year 1932-33, the whole of the financial years 1933-34, and 1934-35, and one month, or thereabouts, of the financial year 1935-36, the husband was entitled to deduct tax on making the payments. It was found as a fact that, taking his fluctuations of income into account, he had over-deducted 156*l.* 10*s.* 0*d.*, and it was held in favour of the husband that he was entitled to deduct and retain tax in respect of the whole of that sum, and judgment, therefore, was given for the balance. The whole of this appeal, reduced to its final analysis, is based on one sentence and one sentence only in the judgment of Slesser L.J., who said : " Whenever in such a case the payment for the whole year in " question has not been made, it is still open to the person " liable to make the payment to deduct and retain thereout " the income tax thereon, notwithstanding that for some weeks " during that year the payments were made in full." Now, it is said to follow from that passage, applied to the facts of the present case, that although the Court of Appeal held that nothing could be re-opened before that financial year, the whole of the annual payments not having been made for that financial year 1932-33, it was open to the husband, on making the balance of his payments—whenever he made it—not merely to deduct the tax thereon but to deduct the tax on

(1) [1938] 1 K. B. 320.

C. A.
1946
JOHNSON v. JOHNSON.
Lord Merriman P.

payments already made in full. I agree that, taken by itself, it is possible to read that sentence in that way. I am quite convinced, however, that, read in conjunction with the rest of the judgment, it is not what the learned lord justice meant, nor is it what the court decided.

It may be desirable, first of all, to give my own view on the way in which it was decided that no payment had been made in full in respect of the first incomplete financial year. An argument had been addressed to the Court of Appeal upon the well known proposition that in the absence of anything said to the contrary, payments on account of an outstanding debt should be appropriated to the earlier outstanding items. On that basis, if it had been applied to that case, it would have been apparent that the account for the financial year 1932-33 had long since been closed. I have not worked it out in detail, but I suspect, also, that it would turn out that the account for the next financial year had been closed, too; but the reason why the Court of Appeal held that this sum of 156*l.* 10*s.* was an under-payment in respect of all four years or parts of the four years must, I suspect, have been this (because no attention was paid to this argument about appropriation at all):—the husband himself, in making his periodical payments during those years had deliberately and designedly intended to pay short, taking credit to himself, with each payment, for failure to deduct tax in respect of some earlier year. In those circumstances, when he meant all the time to be paying only in part, it would manifestly have been unreal to effect a notional payment of the whole. He meant deliberately to under-pay, payment by payment, during the whole of those years. Accordingly, this sum of 156*l.* 10*s.* 0*d.* represented a certain sum in respect of the last eight months of 1932-33, a certain sum in respect of the next two financial years, and a certain sum in respect of the one month before the issue of the writ in May, 1935, and accordingly there had never been made a payment of whatever that sum was for each of those financial years, and the payment would not be made until it was made in accordance with the judgment. Upon making the payment in accordance with the judgment, the amount of the tax thereon (not on anything else, but "thereon"—i.e., on 156*l.* 10*s.* 0*d.*) might be deducted, according to the judgment of the trial judge and of the Court of Appeal; and there is, on that analysis of the facts, no warrant, in my judgment, for the view that the Court of Appeal said that

deduction might be made in respect of that part of the first of these financial years in respect of which the payment was made in full. On the contrary, every judge who gave judgment, including Slesser L.J. said exactly the opposite. Slesser L.J. (and his is the judgment vouched in support of this argument), said this (1): "By the sub-rule already mentioned, "the defendant was entitled, on making each of these payments, "to deduct thereout the income tax thereon, but he made no "deduction of tax from any of these payments. By August, "1932, he had made payments equalling in amount the whole "of the weekly sums that were due from him down to that "time, without making any deduction in respect of income tax, "and the right to deduct tax given by the sub-rule being "a right to do so on making such payment and not otherwise, "the right of deduction in respect of those payments was "gone." Substituting 1945 for 1932, every word of that passage applies to the circumstances of this case, with the added force that, whereas somewhat laboured accountancy was necessary in order to square the account at August, 1932, in this case, as I have said, up to August, 1945, the account had squared itself week by week by exact and punctual payments. Greer L.J. said this (1): "In the present case "the defendant by August, 1932, had made in full the payments "for which he was so far liable without deducting income "tax, and he was, therefore "—(mark the word "therefore") "no longer entitled under the sub-rule to deduct tax in respect "of those payments." In my opinion the whole of the argument in this case is based on a complete misconception of the law applicable to deducting and retaining tax, and the case of *Taylor* v. *Taylor* (2), on which the accountant's letter was expressly based, has been, in my opinion, misunderstood. When once it is rightly understood it affords no support for the husband's failure to pay any sum at all, taking his rights at their extreme, during the four months following the discovery of the true position; and it is conceded, therefore, if that is so, that there can be no answer to the wife's claim for wilful neglect to maintain at the time when she issued her summons.

I have already dealt with the question of amount.

In my opinion this appeal must be allowed, but allowed only for the purpose of varying the amount by consent, and, in my view, the wife having in substance succeeded on the real point of the case, should have the costs of the appeal.

(1) [1938] 1 K. B. 320, 332, 335. (2) Ibid. 320, 333.

C. A.
1946
JOHNSON v. JOHNSON.

WILLMER J.: I agree. My Lord has dealt very fully with the facts of this case and with the arguments which have been so well presented to us by counsel. It is, therefore, unnecessary for me to do more than state in a few words the reasons which impel me to the same conclusion.

The appeal, as I understand it, was brought on the basis that the husband, in discontinuing his payments under the separation agreement, was doing no more than he was legally entitled to do, and it is said that upon that view he cannot be held to be guilty of wilful neglect to maintain. In support of that proposition the case of *Taylor* v. *Taylor* (1), to which my Lord has referred, was cited, but, for the reasons already pointed out, that case is not an authority for the proposition contended for. Indeed, in my view, it is an express authority to the contrary. In that case the husband was seeking to deduct the tax on the whole amounts for the four financial years since 1932, and the unanimous decision of the court was that he was not entitled to do so; on the contrary, he was entitled to deduct only the tax on the remaining unpaid residue, and that is made clear in the judgment of Greer L.J. (1) and again in the judgment of Slesser L.J. (2) My Lord has already referred to the last sentence of the judgment of Slesser L.J., which it has been suggested is some authority for the proposition contended for by the husband in this case. I do not so read that sentence. To my mind, if one reads the last sentence of the judgment of Slesser L.J. carefully, it is in exact accord with what he had said before and with what the court decided: "Whenever in such a case "the payment for the whole year in question has not been "made, it is still open to the person liable to make the "payment"—and that is the payment which has not yet been made—"to deduct and retain thereout the income tax "thereon," which appears to me to be exactly what the learned lord justice had previously said in the earlier part of his judgment, and the basis of the decision of the court.

It follows, therefore, in my judgment, that the husband, when he caused all payments under the separation agreement to be stopped as from the beginning of August, 1945, was not doing anything which he was legally entitled to do. I should like to add that even if he were doing what he was legally entitled to do under the separation agreement, that would not, in my judgment, conclude this case. This is not an action

(1) [1938] 1 K. B. 320, 333. (2) Ibid. 320, 335, 336.

on the agreement. If the argument for the appellant were successful it might afford a good defence to an action on the agreement; but we are here dealing with something quite different, namely, whether or not the husband had wilfully neglected to maintain his wife. Assuming the argument for the husband to be right, it might be that the situation had arisen in which, for the moment, there was nothing payable under the agreement; but the husband's liability to maintain his wife must, in my judgment, continue. It could not, I think, on any view of the facts be right that a husband could cut off his wife from any weekly contributions at all for a period of four months—which is what would have been the result in this case—and then be heard to take shelter under the supposed rights conferred by a separation agreement.

For these reasons it is clear that from the beginning of August there has been failure to maintain on the part of the husband. The learned magistrate has held that the failure to maintain was a wilful failure to maintain within the statute, and, in my judgment, there was ample evidence to support that finding. As I have said, there was certainly a failure to maintain, and it was a failure deliberately and knowingly made. It was based on a misapprehension of the law, and it may be that that misapprehension was a bona fide one, but it was a knowing and wilful failure.

A number of cases have been cited to us on the meaning of wilful failure to maintain. I do not think it is necessary to refer to any of them now, except to say that I see nothing in any of them to support the suggestion that the learned magistrate in this case was doing anything wrong in coming to the conclusion, on the facts before him, that this husband was guilty of a wilful failure to maintain.

For these reasons, in my judgment, the appeal fails so far as the main question is concerned; but I agree with my Lord, for the reasons stated by him, that it succeeds on the question of quantum and to the extent which he has pointed out, and I concur in the order proposed by my Lord.

Appeal allowed.

Solicitors for the appellant: *W. R. Perkins, for Hamilton Hill & Evershed, Leyton.*

Solicitors for the respondent: *Young & Cowper.*

I. G. R. M.

C. A.

1946
July 26.

Morton,
Bucknill and
Somervell L.JJ.

MEACHER *v.* MEACHER.

Divorce—Cruelty—Unreasonable order by husband—Disobedience by wife—Assaults by husband—Past cruelty as ground for decree—Supreme Court of Judicature (Consolidation) Act, 1925 (5 & 6 *Geo.* 5, *c.* 49), *s.* 176, *as amended by Matrimonial Causes Act*, 1937 (1 *Edw.* 8 & *Geo.* 6, *c.* 57), *s.* 2.

A husband unreasonably ordered his wife not to visit her sister, and on several occasions violently assaulted her for disobedience to this order. She eventually left him and lived with the sister:—

Held (reversing Henn-Collins J.), that she was entitled to a decree nisi on the ground of cruelty. There is nothing either in s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925 as amended by s. 2 of the Matrimonial Causes Act, 1937, or in the authorities, to justify the view that a wife who has suffered assaults is not entitled to a decree unless she can prove that the assaults are likely to continue. A divorce can be granted on the ground of cruelty already suffered by the petitioner. Nor is a wife petitioner disentitled to a decree because she has it in her power to put an end to the cruelty by obeying unreasonable orders from her husband.

APPEAL from Henn-Collins J.

This was a poor person's undefended petition on the ground of cruelty. The wife petitioner alleged that about a year after the marriage in 1937 a child was born, and in the same year, 1938, the respondent knocked her about and hit her in the stomach with his fist. That incident was apparently on a different footing from the subsequent assaults alleged, which all seemed to arise out of the respondent objecting to the petitioner visiting her sister—who was a perfectly reputable person, and the petitioner's only near relative. When the petitioner disobeyed this unreasonable prohibition, the respondent on a number of occasions violently assaulted her. Finally, in June, 1939, the respondent followed the petitioner to her sister's house, and finding her sitting in a chair with the baby in her lap, knocked her down on to the floor and further assaulted her. She had a nervous breakdown, and declined to return to the husband, but lived with her sister.

Henn-Collins J. refused a decree on the ground that the intervention of the court was based on what was expected to happen, past cruelty being relevant merely as evidence of the likelihood of future cruelty. Where the parties had separated, there was no such apprehension. Moreover, in his view, the court would not intervene to assist a party who had the remedy

in her own hands by obeying her husband's order not to see her sister; even though she thought it unreasonable, she could have put a stop to the cruelty by compliance. The petitioner appealed.

Simon for the petitioner. Henn-Collins J. misdirected himself in two respects—first in holding that the court will only intervene to protect parties from what they expect to happen, and only if there is likely to be a repetition of previous cruelty. What amounts to cruelty is defined in *Russell* v. *Russell* (1). Even if it be correct that the practice of the ecclesiastical courts and subsequently of the divorce court in granting judicial separation on the ground of cruelty was based wholly on the necessity for future protection, that is not the case under s. 2 of the Matrimonial Causes Act, 1937, which states that a decree shall be granted on the ground that the respondent "has since the celebration of the marriage "treated the petitioner with cruelty." It makes no reference to the likelihood of the cruelty continuing or to future cruelty at all. On this point my submission is that where a husband, since the marriage, has been guilty of conduct which has caused injury or danger to the life, limb, or health, mental or physical, of the wife, he is guilty of cruelty and she is entitled to a decree. It is immaterial whether it is likely to be repeated, or whether she could have avoided it by compliance with unreasonable demands.

Secondly, Henn-Collins J. was wrong, in my submission, in holding that the petitioner was not justified in disobeying an order of her husband even if unreasonable. Disobedience by a wife to a husband's order—and a fortiori to an unreasonable order—can never be provocation justifying an assault on the wife by the husband. He could only excuse it by something which would be a good defence to a criminal charge of assault—e.g., self defence. An order of a husband to a wife has no legal consequence and the wife's disobedience has no legal consequence either.

On the facts the respondent has been guilty of conduct injuring the wife; if the likelihood of repetition is relevant, which I submit it is not, that likelihood exists. Even if the judge was right in holding that the wife was disentitled to a decree because she could have avoided the assaults by obedience, he misdirected himself in holding that all the assaults were due to her disobedience. The first one was not.

(1) [1895] P. 315; [1897] A. C. 395.

C. A.
1946
MEACHER v. MEACHER.

[On the law and practice before the Act of 1937 counsel referred to *Oliver* v. *Oliver* (1), *Holden* v. *Holden* (2). *Dysart* v. *Dysart* (3), which seemed against him was overruled by a higher court.]

MORTON L.J. This is a poor person's appeal, and the court is greatly indebted to Mr. Simon for his able and helpful argument. [After stating the facts, his Lordship continued :] There was plain evidence that—to quote the wording of s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 2 of the Matrimonial Causes Act, 1937—the respondent " has since the celebration of the marriage " treated the petitioner with cruelty." I think there can be no question that the husband had so treated her. Cruelty is defined in *Russell* v. *Russell* (4) : " There must be danger to " life, limb or health, bodily or mental, or a reasonable appre- " hension of it, to constitute legal cruelty." It seems to me that there was clearly danger to limb and health in the present case. The matter is carried a little further by the definition given by Lord Davey in the House of Lords in the same case (5) : " The general idea which I think underlies all those " decisions is that while declining to lay down any hard and fast " definition of legal cruelty, the courts acted on the principle " of giving protection to the complaining spouse against " actual or apprehended violence, physical ill-treatment, or " injury to health."

Here there was actual violence and physical ill-treatment and I can find nothing in s. 176 or in the authorities to justify the view that if a wife has suffered assaults on her person, she is not entitled to a divorce unless she can show that such assaults are likely to continue. There was nothing suggested against the petitioner's sister ; she had, in fact, sometimes invited the respondent, and he had sometimes visited her house, and no reason appeared for the husband's objection to his wife visiting her sister, except his jealousy.

In giving judgment the learned judge said this : " I do not " think, in this case that I should be justified in granting " a decree. I should be very sorry if anything I said seemed to " justify husbands in assaulting their wives, far from it ; it " has got nothing to do with that. But after all, this court

(1) (1801) 1 Hagg. Cons. 361.
(2) (1810) Ib., 453.
(3) (1844) 1 Rob. Ecc. 106.
(4) [1895] P. 315, 322.
(5) [1897] A. C. 395, 467-8.

" does intervene only to protect the parties from what they " expect to happen, and what they expect to happen is founded " upon what has already passed. In no sense is a suit for " dissolution of marriage on the ground of cruelty in respect " of that cruelty. The cruelty that has already taken place is " only relevant as an indication of what is likely to happen in " the future, and if the past is likely to repeat itself. But, as " I say, this court would intervene only if there is likely to be " a repetition. If the wife has it in her own hands to prevent " the repetition of that of which she complains, it seems to me " that this court is not justified in intervening, even if the " order which is given to her is, in her view, or even in the " view of the court, in itself not reasonable."

If this judgment is pushed to its logical extreme, it would seem to follow that a husband may issue unreasonable orders to his wife and beat her if she disobeys them, and that the wife cannot obtain a divorce on the ground of cruelty, however often this happens because she can prevent any further beatings by obeying her husband in all respects. I cannot and do not believe that this is the law, and I think that the judge misdirected himself in two respects. Neither my brethren nor I know of any authority which lays it down that the court will intervene only to protect parties from what they expect to happen. It seems to me, both on the wording of s. 176, and on the observations in *Russell* v. *Russell* (1), that a divorce can be granted on the ground of cruelty already suffered by the petitioner. Secondly, I cannot agree that the court is not justified in intervening, where a wife is given an unreasonable order by her husband and disobeys it, and the husband then violently assaults her. There were several such assaults in this case and in my view there was nothing which amounted to provocation; it is therefore unnecessary to discuss the legal question of the effect of provocation. The appeal must be allowed, and a decree nisi granted.

BUCKNILL L.J. I agree that the appeal should be allowed and will only add this. The learned judge appears to have based his judgment on the proposition that a decree nisi for cruelty will not be granted in respect of acts of cruelty already committed unless there is also a reasonable fear that further acts of cruelty will be committed. This seems to me to impose a condition on the statutory right to a decree for cruelty which

(1) [1895] P. 315; [1897] A. C. 395.

C. A.
1946
MEACHER
v.
MEACHER.
Bucknill L.J.

is not in the Act of 1937. Section 2 of that Act simply states that a decree shall be granted on the ground that since the celebration of the marriage the respondent has treated the petitioner with cruelty. Moreover, under s. 6 of the Act a spouse who had obtained a decree of judicial separation for cruelty, or a separation order under the Summary Jurisdiction Acts for persistent cruelty, before the Act of 1937 was passed, has the right to petition for a decree of divorce on the same facts as those proved in support of that decree or order. But when once such a decree or order has been made there can be no reasonable fear of further acts of cruelty, because the wife is no longer bound to cohabit with her husband.

SOMERVELL L.J. I am of the same opinion, and though we are differing from the court below, I do not desire to add anything.

Appeal allowed.

Solicitor: *Ninian R. Davies.*

J. W. H.

END OF VOL. AND OF PROBATE SERIES FOR 1946.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1946, will be as follows :—

In the First Series,
[1946] Ch.

In the Second Series,
[1946] K. B. [1946] P.

In the Third Series,
[1946] A. C.

INDEX.

CHINA. *See* DIVORCE.

CONDONATION : DESERTION. *See* DIVORCE.

CONTEMPT OF COURT — *Order requiring a specific act to be done by a specified time— Order known to person required to do the act— Service of order after expiration of time for compliance—Disobedience to order—Committal — Jurisdiction—Matrimonial Causes Rules,*
GORDON *v.* GORDON - - **C. A. 99**

CUSTODY OF CHILDREN. *See* DIVORCE.

DAMAGE. *See* SHIPPING.

DIVORCE — *Collusion — Presumption of innocence — Burden of proof negativing collusion.*
EMANUEL *v.* EMANUEL **Denning J. 115**

2. —— *Condoned adultery — Revival by subsequent desertion for less than three years.*
BEARD *v.* BEARD - - **C. A. 8**

3. —— *Cruelty — Unreasonable order by husband—Disobedience by wife— Assaults by husband—Past cruelty as ground for decree— Supreme Court of Judicature (Consolidation) Act,* 1925 (5 & 6 *Geo.* 5, *c.* 49), *s.* 176, *as amended by Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2.
MEACHER *v.* MEACHER - **C. A. 216**

4. —— *Desertion — Maintenance order containing non-cohabitation clause — Order varied and clause deleted — Aggregation of periods of desertion prior to order and subsequent to deletion of clause — Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 6, *sub-s.* 3.
GREEN *v.* GREEN - - **Jones J. 112**

5. —— *Desertion — Petition — Material date for presentation of petition—Whether date on which signed by petitioner or date filed with court — Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 2.
ALSTON *v.* ALSTON - **Willmer J. 203**

DIVORCE—*continued.*

6. —— *Costs— Appeal against order giving custody of child to wife— Co-respondent supporting wife's application— Appeal to which co-respondent was not a party— Allowance of appeal—Form of order as to costs— Matrimonial Causes Rules,* 1944 (*St. R. & O.,* 1944, *No.* 389/L. 16), *r.* 33, *sub-r.* 1.
FENSTON *v.* FENSTON - **C. A. 70**

7. —— *Decree made absolute — Husband's application for custody of legitimated child — Decree of legitimation — Whether necessary — Direction issued from Divorce Registry— Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 193— *Legitimacy Act,* 1926 (16 & 17 *Geo.* 5, *c.* 60), *s.* 1.
M. *v.* M. - - - **Denning J. 31**

8. —— *Nullity — Common law marriage in China.*
WOLFENDEN *v.* WOLFENDEN **Lord Merriman P. 61**

9. —— *Nullity of marriage — Hindu marriage — Subsequent English marriage — Recognition of Hindu marriage.*
SRINI VASAN (ORSE. CLAYTON) *v.* SRINI VASAN - - - - **Barnard J. 67**

10. —— *Wife's petition — Nullity — Agreement between parties to prevent pregnancy while resident in Persia—Subsequent wilful refusal of husband to permit wife to bear children—Persistent use of contraceptives by husband—Coitus interruptus—Marriage not consummated—Matrimonial Causes Act,* 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 57), *s.* 7, *sub-s.* 1 (*a*).
COWEN *v.* COWEN - - - **C. A. 36**

11. —— *Petition — Supplemental petition — Application for leave to file supplemental petition — Desertion — Three years' desertion immediately preceding the presentation of the supplemental petition but not preceding petition—Whether supplemental petition part of original petition—Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 57), *s.* 2.
SPAWFORTH *v.* SPAWFORTH **Hodson J. 131**

DIVORCE—*continued.*

12. —— *Validity of marriage — Desertion —Disappearance of first husband—Inquiries proving fruitless — Remarriage after lapse of ten years—Desertion by second husband—Presumption of validity as to second marriage.* TWENEY *v.* TWENEY - **Pilcher J. 180**

HIGH COURT (Jurisdiction). *See* JUSTICES.

HINDU MARRIAGE. *See* DIVORCE : NULLITY.

HUSBAND AND WIFE — *Income tax — Summary jurisdiction — Maintenance order—Wilful neglect to maintain — Separation agreement—Tax not deducted on payments under agreement — Payments stopped by husband to recover tax not deducted—Whether husband entitled to retain tax in respect of past payments of the current financial year.* JOHNSON *v.* JOHNSON - **Divl. Ct. 205**

INCOME TAX. *See* HUSBAND AND WIFE.

JUSTICES — *Husband and wife — Order of court of summary jurisdiction for custody of child and for maintenance—Application by husband for discharge of maintenance order only—Refusal on ground that matter "would "be more conveniently dealt with in the High "Court"—Procedure — Jurisdiction of High Court — Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict., c.* 39), *s.* 10. PERKS *v.* PERKS - - **C. A. 1**

LEGITIMATION. *See* DIVORCE : CUSTODY OF CHILD.

LIMITATION OF LIABILITY. *See* SHIPPING.

MAINTENANCE ORDER — *Summons by husband to vary amount payable—"Fresh "evidence" and "cause shown"—Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict., c.* 39), *s.* 7—*Criminal Justice Administration Act,* 1914 (4 & 5 *Geo.* 5, *c.* 46), *s.* 30, *sub-s.* 3—*Money Payments (Justices Procedure) Act,* 1935 (25 & 26 *Geo.* 5, *c.* 46), *s.* 9. UNDERWOOD *v.* UNDERWOOD **Divl. Ct. 84**

NULLITY OF MARRIAGE—*Hindu marriage —Subsequent English marriage — Recognition of Hindu marriage — English marriage a nullity.* BAINDAIL (ORSE. LAWSON) *v.* BAINDAIL **C. A. 122**

PETITION. *See* DIVORCE.

PLEADING. *See* PROBATE.

PRACTICE. *See* PRIZE COURT.

PRIZE COURT — *Practice — British merchant ship—Seized in prize by enemy—*

PRIZE COURT—*continued.*

Condemnation as prize by enemy Prize court—Abandonment by British owners—Adapted for war purposes by enemy—Retaken by British—Writ for condemnation issued by British captor—Appearance and claim for restoration by original British owners—Prerogative of Crown to effect release—Withdrawal from adjudication—Naval Prize Act, 1864 (27 & 28 *Vict., c.* 25), *ss.* 40 *and* 55. THE SALERNO - - **Lord Merriman P. 189**

PROBATE — *Pleading — Action setting up will—Plea by defendant that death of deceased due to act of plaintiff—Summons to strike out plea—Whether relevant—Whether plea maintainable in civil action—While plaintiff not prosecuted for felony.* IN THE ESTATE OF G., DECD. M. *v.* L. AND OTHERS - - **Willmer J. 183**

2. —— *Will — Signature in space marked out among dispositive words—Admissibility to probate—Wills Act,* 1837 (7 *Will.* 4 & 1 *Vict., c.* 26), *s.* 9—*Wills Act Amendment Act,* 1852 (15 & 16 *Vict., c.* 24), *s.* 1. IN THE GOODS OF HENRY HORNBY, DECD. **Wallington J. 171**

SHIPPING — *Collision — Convoys meeting on crossing courses — Risk of collision — Duties of single ships—Admiralty notice for guidance of mariners—Regulations for Preventing Collisions at Sea.* THE F. J. WOLFE - - - **C. A. 91**

2. —— *Damage — Collision with wharf at Lagos—Alleged negligence of ship—Action in rem by wharf owners—Jurisdiction—Admiralty Court Act,* 1861 (24 *Vict., c.* 10), *s.* 7. THE TOLTEN - - - - **C. A. 135**

3. —— *Damage at berth — Warehouseowner — Limitation of liability — Landingplace — Dock — Meaning — Merchant Shipping (Liability of Shipowners and Others) Act,* 1900 (63 & 64 *Vict., c.* 32), *s.* 2, *sub-ss.* 4, 5. J. & W. NICHOLSON & CO., LD. *v.* OWNERS OF BARGE "HUMORIST" AND OTHERS. THE "HUMORIST" - - **Willmer J. 198**

4. —— *Limitation of liability — "Improper navigation or management of the "ship" — Fire and explosions from escape of petrol through sea-valves—Merchant Shipping Act,* 1894 (57 & 58 *Vict., c.* 60), *s.* 503—*Merchant Shipping (Liability of Shipowners and Others) Act,* 1900 (63 & 64 *Vict., c.* 32), *s.* 1. THE ATHELVICTOR - - **Pilcher J. 42**

5. —— *Towage — Cardiff tug owners' rates for steamers—"Towage or assistance of "steamers not normal."* THE PRINCESA - - - - **C. A. 79**

2.815167